Supreme Court, U.S.
FILED
NOV 26 1997
CLERK

No. 97-5310

In The

Supreme Court of the United States

October Term, 1997

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Petitioners,

vs.

OCWEN FEDERAL BANK,

Respondent.

JOINT APPENDIX

BRUCE S. ROGOW*
BRUCE S. ROGOW, P.A.
2441 S.W. 28th Avenue
Fort Lauderdale, Florida
33312
(954) 767-8909

**Counsel of Record*
for Petitioners

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Petition For Certiorari Filed July 21, 1997
Certiorari Granted October 14, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

183 pp

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CASE NO: 92 006071 PAGE 1
FILE NO: 12

CIRCUIT DIVISION PROGRESS DOCKET
11/20/97 02:09 PM STATUS: REDISPOSED
DIVISION: AG – KATHLEEN J. KROLL

TYPE CASE: 07 – R/P AND FRCLSUR

****

GREAT WESTERN BANK FKA GREAT WESTERN SAVINGS

- VS -

BEACH, DAVID R

****

ALL PARTIES IN CASE

PLAINTIFF
GREAT WESTERN BANK FKA GREAT WESTERN SAVINGS 010415
REP BY: ELLISON, ESQ., STEVEN 051031
400 AUSTRALIAN AVE SOUTH #500
WEST PALM BEACH FL 3340

DEFENDANT
BEACH, DAVID R 094333
REP BY: BONFIGLIO, JAMES ANTHONY 028805
PO BOX 1489 BOYNTON BEACH FL 3342

DEFENDANT
BEACH, LINDA M 094333
REP BY: BAKST, ESQ, DANIEL LLOYD 000309
P.O. DRAWER 3948 WEST PALM BEACH FL 3340

DEFENDANT
BENEFICIAL MORTGAGE CO OF FLORIDA 008596
REP BY: STILL JR, ESQ., JOSEPH KOGER 018459
500 AUSTRALIAN AVE SOUTH SUITE 600
WEST PALM BEACH FL 3340

DEFENDANT
SET-N-SUN OWNER'S ASSOCIATION, INC 021689

DEFENDANT
UNITED STATES OF AMERICA 010070
% UNITED STATES ATTORNEY
99 N E 4TH STREET MIAMI FL 3313

PLAINTIFF
OCWEN FEDERAL BANK 032503

010101 0000

**********DEFAULT ENTERED**********

060892 0001

COMPLAINT
JR-NOJR/CT-NOCT N
W/ATTACHMENTS

060892 0002

LIS PENDENS
BOOK/PAGE 07275 00847

060892 0003

CIVIL COVER SHEET

060892 0004

SUMMONS ISSUED
PARTY NAME BEACH, DAVID R
COUNTER
SUMMONS SERVED
DATE SERVED 06/13/92
RETURNED 061892

060892 0005

SUMMONS ISSUED
PARTY NAME BEACH, LINDA M
COUNTER
SUMMONS SERVED
DATE SERVED 06/13/92
RETURNED 061892

060892 0006

SUMMONS ISSUED
PARTY NAME BENEFICIAL
MORTGAGE CO OF FLORIDA
COUNTER
SUMMONS SERVED
DATE SERVED 06/17/92
RETURNED 062292

060892 0007

SUMMONS ISSUED
PARTY NAME
SET-N-SUN OWNER'S
ASSOCIATION, INC
COUNTER
SUMMONS SERVED
DATE SERVED 06/13/92
RETURNED 061892

060892 0008

SUMMONS ISSUED
PARTY NAME UNITED STATES OF
AMERICA
COUNTER
SUMMONS SERVED
DATE SERVED 06/15/92
RETURNED 061892

060892 0009

SUMMONS ISSUED
(FOR PARTIES W/O NAME
NUMBERS)
JOHN DOE
COUNTER
SUMMONS SERVED
DATE SERVED 06/13/92
RETURNED 061892

060892 0010

SUMMONS ISSUED
(FOR PARTIES W/O NAME NUMBERS)
JANE DOE
COUNTER
SUMMONS SERVED
DATE SERVED 06/13/92
RETURNED 061892

063092 0011

ANSWER WITH AFFIRMATIVE DEFENSES
OF DEFTS. DAVID & LINDA BEACH
TO THE COMPLAINT BY JAMES BONFIGLIO

063092 0012

NOTICE OF APPEARANCE
ATTORNEY:
PARTY NAME BEACH, DAVID R
ATTORNEY NAME
BONFIGLIO, JAMES ANTHONY
& DEFT. LINDA BEACH BY
JAMES BONFIGLIO

063092 0013

AFFIRMATIVE DEFENSES
OF DEFTS. DAVID & LINDA BEACH

070792 0014

ANSWER
PARTY NAME
BENEFICIAL MORTGAGE CO OF FLORIDA
TO THE COMPLAINT BY JOSEPH STILL

072092 0015

REPLY TO AFFIRMATIVE DEFENSES
PARTY NAME
GREAT WESTERN BANK FKA
GREAT WESTERN
OF PLTF TO DEFTS BY
PETER M ARMOLD
W/ATTACHMENTS

080692 0016

STIPULATION/ORDER
THAT BROAD AND CASSEL IS SUBSTITUTED AS COUNSEL FOR GREAT WESTERN BANK, ETC. IN PLACE OF GARY, DYTRYCH, ETC. DTD. 8/5/92 SAR

102792 0017

NOTICE
OF DEFTS. OF SERVICE OF INTERROGS TO PLTF.

102792 0018

REQUEST
OF DEFTS. TO PRODUCE

110292 0019

MOTION
OF DEFT FOR ENTRY OF PARTIAL SUMMARY JUDGMENT

112092 0021

NOTICE
OF DEFTS. TO PLACE HEARING ON MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT ON NEXT AVAILABLE DOCKET

112492 0021

OBJECTION TO
OF PLTFS. TO REQUEST TO
PRODUCE PROPOUNDED UPON
PLTF, BY DEFTS.

120992 022

NOTICE OF HEARING
HEARING DATE/TIME 12/15/92
08:45 AM
PLTFS OBJECTIONS TO REQUEST TO
PRODUCE PROPOUNDED UPON
PLTF BY DEFTS

121692 0023

NOTICE OF HEARING
HEARING DATE/TIME 12/15/92
08:45 AM
BEFORE JD/THOMAS E. SHOLTS ON
PLTFS' OBJECTIONS TO REQUEST
TO PRODUCE PROPOUNDED UPON
PLTF BY DEFTS

010793 0024

MOTION
OF DEFTS/BEACH'S TO PREVEN
PLTF ROM TAKING INCONSISTENT
POSITION

011393 0025

RE NOTICE OF HEARING
HEARING DATE/TIME 01/27/93
08:45 AM
IN RE: PLTFS, OBJECTIONS TO
REQUEST TO PRODUCE
PROPOUNDED UPON PLTF. BY
DEFTS.

021893 0026

AFFIRMATIVE DEFENSES
OF DEFTS. DAVID & LINDA BEACH

022293 0028

NOTICE OF FILING
OF PLTF. OF ANSWERS TO
INTERROGS PROPOUNDED BY
DEFTS.

022293 0028

RESPONSE
OF PLTF. TO REQUEST TO
PRODUCE

022693 0029

NOTICE
OF PLTF. OF INTERROGS
PROPOUNDED TO DEFTS.

022693 0030

REQUEST
OF PLTF. DAVID & LINDA BEACH
TO PRODUCE

022693 0031

REQUEST
OF PLTF. FOR ADMISSIONS

030993 0032

RESPONSE
OF DEFTS. TO REQUEST TO
PRODUCE

031693 0033

NO D.E. #--CLERKS ERROR

031693 0034

NO D.E. #--CLERKS ERROR

041693 0035

NOTICE OF FILING
OF PLTF. OF AFFIDAVITS IN OPPOSITION TO DEFTS. MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT AS EXHIBITS ATTACH

042193 0036

MOTION
OF PLTF. FOR PARTIAL SUMMARY JUDGMENT

042793 0037

NOTICE OF HEARING
HEARING DATE/TIME 05/04/93 02:00 PM
IN RE: PLTF. MOTION FOR PARTIAL SUMMARY JUDGMENT

060893 0038

MOTION FOR DEFAULT
PARTY NAME GREAT WESTERN BANK FKA GREAT WESTERN
DENIED AS TO DFTS JOHN & JANE DOE NKA DAVID AND LINDA BEACH - ANSWER FILED *

061093 0039

DEFAULT
PARTY NAME SET-N-SUN OWNER'S ASSOCIATION, INC
PARTY NAME UNITED STATES OF AMERICA
CTA/MJH

062193 0040

NOTICE OF HEARING
HEARING DATE/TIME 07/16/93 02:30 PM
RE: MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT

070293 0041

MOTION/NOTICE TO SET FOR NON JURY TRIAL
PARTY NAME GREAT WESTERN BANK FKA GREAT WESTERN OF PLTF'S (SENT TO JUDGE ON 7/2/93)

071493 0042

ORDER SETTING NON JURY TRIAL
PRETRIAL DATE/TIME 10/08/93 08:45 AM
TRIAL DATE/TIME 10/18/93 00:00 AM
IN ROOM 333
DTD. 7/13/93 TES

071493 0043

NOTICE OF FILING
OF PLTF. OF AFFIDAVIT OF CINDY NEWMAN IN OPPOSITION TO DEFTS. MOTION FOR PARTIAL SUMMARY JUDGMENT WITH EXHIBIT A ATTACHED HERETO

071493 0044

MOTION
OF PLTF. TO AMEND PLTF. REPLY TO DEFTS. DAVID & LINDA BEACH AFFIRMATIVE DEFENSES WITH EXHIBIT A ATTACHED

071493 0045

NOTICE OF HEARING
HEARING DATE/TIME 07/16/93 02:30 PM
IN RE: (SEE DOCKET # 44) (CROSS-NOTICE, SPECIALLY SET)***

071693 0046

ORDER
THAT DEFTS. MOTION FOR ENTRY OF PARTIAL SUMMARY JUDGMENT IS DENIED DTD. 7/16/93 TES

071693 0047

ORDER
GRANTING PLTF. MOTION TO AMEND PLTF. REPLY TO DEFTS. DAVID & LINDA BEACH AFFIRMATIVE DEFENSES DTD. 7/16/93 TES

083093 0048

MEDIATION CONFERENCE REPORT

100893 0049

PRETRIAL STIPULATION
OF PLTF. & DEFTS.

100893 0050

NOTICE OF TAKING DEPOSITION
OF PLTF. OF RC: FIDELITY FEDERAL SAVINGS BANK & DEBORAH SCHIAVONE ON 10/14/93

101493 0051

MOTION
OF PLTF. FOR APPOINTMENT OF COMMISSIONER

101493 0052

NOTICE OF TAKING DEPOSITION
OF PLTF. OF JOSEPH GRECO ON 10/15/93 (TELEPHONIC)***

101593 0052A

AGREED ORDER
GRANTING PLTF. MOTION TO APPOINT COMMISSIONER & ANY DULY CERTIFIED COURT REPORTER EMPLOYED WITH PACIFIC COAST COURT REPORTERS IS APPOINTED AS COMMISSIONER FOR TAKING THE DEPO OF JOSEPH GRECO DTD. 10/14/93 TES

101893 0053

EXHIBIT LIST BY CLERK
OF DEFTS. DAVID & LINDA BEACH FOR TRIAL

101993 0054

NOTICE OF FILING
OF PLTF. OF EXHIBIT LIST & WITNESS LIST

102093 0055

NOTICE OF FILING
OF TRIAL CLERK, PLTF AND DEFT'S EXHIBIT LISTS *** PLTFS EXHIBITS 1 - 18 AND DEFTS EXHIBITS 1 - 10 ARE IN A BROWN ENVELOPE IN THE EVIDENCE ROOM ***

102093 0056

DEPOSITION
ORIGINAL, OF JOSEPH GRECO

102593 0057

SUBPOENA ISSUED/SUBPOENA SERVED
DATE SERVED 10/08/93
RC: DEBORAH SCHIAVONE

111793 0058

SUGGESTION OF BANKRUPTCY
PARTY NAME BEACH, DAVID R & DEFT. LINDA BEACH AS TO CASE #93-33829-BKC-PGH BY DANIEL BAKST (STILL PENDING)***

030994 0059

NOTICE OF HEARING
HEARING DATE/TIME 03/18/94 02:00 PM (SPECIALLY SET) IN RE: PLTF. MOTION FOR ENTRY OF FINAL JUDGMENT

032394 0060

FINAL JUDGMENT
AMT OF JUDGMENT 116801.77
BOOK/PAGE 08185 00040
OF FORECLOSURE (NO SALE DATE LISTED)****
DTD. 3/23/94 TES (COPIES MAILED WITH BLANK NOS)***

040494 0061

MOTION
OF PLTF FOR REHEARING (UP 4/5/94)

040594 0062

MOTION
OF DEFTS. DAVID & LINDA BEACH TO TAX ATTY. FEES

041394 0063

NOTICE OF HEARING
HEARING DATE/TIME 04/22/94 09:00 AM
IN RE: DEFT. MOTION FOR ATTY. FEES

041494 0063A

ORDER THAT MOTION FOR REHEARING/RECONSIDERATION IS DENIED DTD 4/14/94 TES
BOOK/PAGE
BOOK/PAGE 08219 01942

041494 0064

NOTICE OF APPEAL
BOOK/PAGE 08217 01782
PARTY NAME BEACH, DAVID R
ATTORNEY NAME BONFIGLIO, JAMES ANTHONY
TO 4DCA – FINAL JUDGMENT RENDERED 3/23/94. (1 PG) APPEAL ALSO INCLUDES LINDA M. BEACH

041594 0065

PD BY PT CK/CASH FOR FILING
NOTICE OF APPEAL
AMT DEPOSITED 55.00
CHECK/RECPT # 00007128
BY JAMES A. BONFIGLIO

PD BY PT CK/CASH FOR C.C. OF
NOTICE OF APPEAL
AMT DEPOSITED 1.15
CHECK/RECPT # 00007128

042194 0066

ACKNOWLEDGMENT FROM 4TH DCA
APPEAL FILED 4/14/94 GIVEN
CASE NO. 94-1049
TRUE COPY OF ORDER FROM 4TH
DCA
APPELLANTS HAVE 15 DAYS TO
FILE A COPY OF THE ORDER
BEING APPEALED

042994 0067

AFFIDAVIT
OF JAMES A. BONFIGLIO IN
SUPPORT OF ATTY FEES

042994 0068

FINAL JUDGMENT
BOOK/PAGE 08241 00375
THAT JAMES A. BONFIGLIO P.A. AS
ATTY FOR DAVID R. BEACH AND
LINDA M. BEACH HIS WIFE SHALL
HAVE AND RECOVER FROM GREAT
WESTERN BANK A FEDERAL
SAVINGS BANK, UNITED STATES
CORPORATION F/K/A GREAT
WESTERN SAVINGS THE SUM OF
$10,206.20 FOR ALL OF WHICH LET
EXECUTION ISSUE. DTD 4/29/94
TES
UPDATE/CHANGE OR CORRECT
CASE STATUS ONLY
MANDATORY DATE 05/02/94

053194 0069

NOTICE OF APPEAL
BOOK/PAGE 08287 00097
PARTY NAME GREAT WESTERN
BANK FKA GREAT WESTERN
ATTORNEY NAME ELLISON, ESQ.,
STEVEN
TO 4 DCA – FINAL JUDGMENT ON
ATTY FEES RENDERED 4/29/94.
(1 COPY)

06019 0070

PD BY PT CK/CASH FOR FILING
NOTICE OF APPEAL
AMT DEPOSITED 55.00
CHECK/RECPT # 00000348
BY BROAD & CASSEL
PD BY PT CK/CASH FOR C.C. OF
NOTICE OF APPEAL
AMT DEPOSITED 1.15
CHECK/RECPT # 00000348

060194 0071

TRUE COPY OF ORDER FROM 4TH
DCA
94-1049. TIME TO FILE TRANSCRIPT
EXTENDED TO 6/28/94.
INITIAL BRIEF DUE 30 DAYS FROM
SERVICE OF INDEX

060794 0072

ACKNOWLEDGMENT FROM 4TH DCA
APPEAL FILED 5/31/94 GIVEN
CASE NO. 94-1551
TRUE COPY OF ORDER FROM 4TH
DCA

APPELLANT HAS 15 DAYS TO FILE
A CONFORMED COPY OF THE
ORDER BEING APPEALED

061094 0073

DEPOSITED INTO DEPOSIT/BOND
ACCOUNT
AMT DEPOSITED 11.00
CHECK/RECPT # 00000484
BY BROAD & CASSEL FOR
ESTIMATED COSTS TO PREPARE
RECORD ON APPEAL

062394 0074

TRUE COPY OF ORDER FROM 4TH
DCA
94-1049, 94-1551. APPEALS ARE
NOW CONSOLIDATED FOR
RECORD PURPOSES ONLY

062994 0075

TRANSCRIPT
PROCEEDINGS OF 10/20/93

070694 0076

REQUEST TO PRODUCE
DEFTS., TO PLTF.,
PURSUANT TO FRCP 1.350

070694 0077

NOTICE OF TAKING DEPOSITION
OF DEFT OF OF PLTF ON 7/22/94
AT 11:00 A.M.

070794 0078

DEPOSITED INTO DEPOSIT/BOND
ACCOUNT
AMT DEPOSITED 59.00
CHECK/RECPT # 00007209
BY JAMES A. BONFIGLIO FOR
ESTIMATED COSTS TO PREPARE
RECORD ON APPEAL

071294 0079

STATEMENT FOR PREPARATION OF
RECORD ON APPEAL
94-1049 & 94-1551, 2 VOL., RECORD
PGS 1-117, TRANSCRIPT PGS 1-72
INCL., ONE ENVELOPE, PLTF'S
PORTION, $11.00 DFT'S PORTION,
$59.00
COPY
INDEX TO RECORD ON APPEAL
REQUEST
TO ACCTING FOR $11.00 & $59.00
(EST COSTS) DEPOSITED TO
PREPARE RECORD, NOW EARNED.
PAID IN FULL

071494 0079A

RETURNED MAIL
TO JOSEPH STILL
(UNDELIVERABLE AS ADDRESSED)

072294 0080

RE-NOTICE OF TAKING DEPOSITION
IN AID OF EXECUTION, OF R/C
GREAT WESTERN ON 7/29/94

072694 0081

PD OUT OF DEPOSIT/BOND ACCOUNT
AMT DISBURSED 11.00
CHECK/RECPT # 00003148
TO CLERK FROM ESTIMATED COST TO PREPARE RECORD ON APPEAL PLTF'S PORTION, DEPOSITED 6/10/94 BY BROAD AND CASSEL, NOW EARNED.
PREPARATION OF RECORD ON APPEAL/FEE
AMT DEPOSITED 11.00
CHECK/RECPT # 00003148
4DCA NO. 94-1049 & 94-1551

072694 0082

PD OUT OF DEPOSIT/BOND ACCOUNT
AMT DISBURSED 59.00
CHECK/RECPT # 00003140
TO CLERK FROM ESTIMATED COST TO PREPARE RECORD ON APPEAL DFT'S PORTION, DEPOSITED 7/7/94 BY JAMES A. BONFIGLIO, NOW EARNED.
PREPARATION OF RECORD ON APPEAL/FEE
AMT DEPOSITED 59.00
CHECK/RECPT # 00003140
4DCA NO. 94-1049, 94-1551

072994 0083

RECORDS FORWARDED TO 4TH DCA
94-1049 & 94-1551, TWO VOLUMES, ONE ENVELOPE

080394 0084

RECORDS FORWARDED TO 4TH DCA
4DCA CASE # 94-1049 & 94-1551
TWO VOLUMES, ONE ENVELOPE

080394 0085

RECORDS FORWARDED TO 4TH DCA
4DCA CASE # 94-501
2 FIRST & SECOND SUPPLEMENTAL VOLUMES, 1 ENVELOPE

092194 0086

CHECK-OUT RECEIPT FOR EXHIBITS (IN HOUSE)
PLTFS EXHIBITS 1-18; DEFTS EXHIBITS 1-10 BY KRISTEN PUHALAINEN (J.A.) SIGNED BY JERRY OVERLY (PER PHONE CONVERSATION W/FOURTH DISTRICT ON 1/8/96 EXHIBITS ARE STILL AT FOURTH DISTRICT (ONE ENVELOPE RE: 94-1049 AND ONE ENVELOPE RE: 94-501) ND

013095 0087

TRUE COPY OF ORDER FROM 4TH DCA
94-1551. PER NOTICE OF VOLUNTARY DISMISSAL, APPEAL IS DISMISSED.

020296 0088

TRUE COPY OF ORDER FROM 4TH DCA
ON 1/31/96 RE: 94-01049 GRANTING APPELLEE'S COUNSEL'S MOT FOR ATTY'S FEES & DENYING

APPELLANT'S MOTION FOR ATTY FEES AND COSTS

052096 0089

TRUE COPY OF ORDER FROM 4TH DCA
GRANTING APPELLANTS' 4/24/96 MOTION FOR STAY PENDING SUPREME COURT REVIEW RE: 4DCA CASE NO. 94-1049

042997 0090

TRUE COPY OF ORDER FROM SUPREME COURT
87,835 - 4DCA # 94-1049 - 4/25/97 PETITIONERS' MOTIONS FOR REHEARING AND ATTORNEY FEES ARE DENIED; RESPONDENT'S MOTION FOR ATTORNEY FEES AND COSTS GRANTED

051397 0091

MANDATE FROM APPEALS COURT
94-1049-5/12/97 - OPINION FILED 1/31/96

060297 0092

TRUE COPY OF ORDER FROM SUPREME COURT
87,835 - 4 DCA 94-1049 5/28/97 VACATING MANDATE

060697 0093

RECORD ON APPEAL INDEX. (REASSEMBLED)
94-1049/94-1551

061397 0094

CHECK-IN RECEIPT FOR EXHIBITS (IN-HOUSE)
PLTF'S EVIDENCE RECEIVED BY DOTTIE REMCHUK, ON 6/13/97

072397 0095

NOTICE OF HEARING
HEARING DATE/TIME 07/28/97 08:45 AM
PLTF'S M/TO SET FORECLOSURE SALE

072397 0096

MOTION
OF PLTF, TO SET FORECLOSURE SALE - W/ATTACHMENTS

072897 0097

RE NOTICE OF HEARING
HEARING DATE/TIME 07/31/97 08:45 AM
PLTF'S M/TO SET FORECLOSURE SALE; & PLTF'S M/FOR SUBSTITUTION OF PARTY PLTF

072897 0098

MOTION
OF OCWEN FEDERAL BANK, FOR SUBSTITUTION OR PARTY PLTF - W/ATTACHMENTS

073197 0099

ORDER
THAT PLTFS MOTION FOR SUBSTITUTION OF PARTY PLTF IS GRANTED. OCWEN FEDERAL BANK

SHALL BE SUBSTITUTED AS PARTY PLTF IN THIS CAUSE & SHALL BE ENTITLED TO A CREDIT FOR THE FULL AMOUNT OF GREAT WESTERN BANKS JUDGMENT, PLUS INTEREST WHICH HAS ACCRUED SINCE THE ENTRY OF THE JUDGMENT & COSTS WHICH HAVE BEEN EXPENDED IN CONNECTION WITH THE FORECLOSURE SALE. DTD 7/31/97 KJK

073197 0100

ORDER
ON PLTFS MOTION – RESETTING SALE DATE (TO 9/29/97) 7/31/97 KJK
UPDATE/CHANGE OR CORRECT CASE STATUS ONLY
MANDATORY DATE 08/13/97
MANDATORY DATE 08/13/97

073197 0101

NOTICE OF SALE
MANDATORY DATE 09/29/97
(1) COPY TO PBDBR TO PUBLISH AUGUST 19 & 26, 1997
(2) COPIES TO PTYS

090497 0102

MOTION TO STRIKE
PARTY NAME BEACH, DAVID R & OF DEF, LINDA M BEACH, SALE DATE

090497 0103

NOTICE OF HEARING
HEARING DATE/TIME 09/17/97 08:45 AM
SEE ABOVE MOTION

091697 0104

RE NOTICE OF HEARING
HEARING DATE/TIME 09/18/97 08:45 AM
DEFS M/TO STRIKE SALE DATE

091897 0105

ORDER
DEF'S M/TO STRIKE SALE IS DENIED. DTD 9/18/97 KJK
UPDATE/CHANGE OR CORRECT CASE STATUS ONLY
MANDATORY DATE 09/19/97
MANDATORY DATE 09/19/97

092497 0106

COPY
(FAXED COPY) OF LETTER TO JEFFREY KAUFMAN, ESQ. FROM STEVEN ELLISON, ESQ. ON INTEREST RATE FOR F.J.

092997 0107

PROOF OF PUBLICATION
NOTICE OF SALE

092997 0108

NOTICE OF FILING
AFFIDAVIT OF ADDITIONAL INTEREST & COSTS

092997 00109

AFFIDAVIT
OF ADDITIONAL INTEREST &
COSTS

092997 0110

CLERKS FEE FOR HOLDING SALE
AMT DEPOSITED 40.00
CHECK/RECPT # 00009851
BY STEVEN ELLISON
DEPOSITED INTO DEPOSIT/BOND
ACCOUNT
AMT DEPOSITED .70
CHECK/RECPT # 00009851
BY STEVEN ELLISON FOR DOC
STAMPS

092997 0111

CERTIFICATE OF SALE
PROPERTY SOLD TO PLTF, OCWEN
FEDERAL BANK, FOR $100.00 (1PG)
(COPIES MLD)

101097 0112

CERTIFICATE OF TITLE
BOOK/PAGE 10030 00428
ISSUED TO OCWEN FEDERAL
BANK, (1 PG)
PD OUT OF DEPOSIT/BOND
ACCOUNT FOR DOC STAMPS
AMT DISBURSED .70
CHECK/RECPT # 00000000

101097 0113

CERTIFICATE OF DISBURSEMENT
(PLAINTIFF)

101497 0114

CERTIFICATE OF MAILING

101597 0115

NOTICE OF HEARING
HEARING DATE/TIME 10/16/97
08:45 AM
DEFS EMERGENCY OBJECTION TO
CONFIRM SALE & ISSUE CERT OF
TITLE

101597 0116

OBJECTION TO
(EMERGENCY) OF DEFTS; TO ISSUE
CERT OF TITLE AND
CONFIRMATION OF SALE

101697 0117

ORDER
DEF'S EMERGENCY OBJECTION TO
ISSUE CERT OF TITLE &
CONFIRMATION OF SALE IS
DENIED IF TITLE ISSUED BY
CLERK. (IF NOT ISSUED – 30 DAY
STAY) DTD 10/16/97 KJK
UPDATE/CHANGE OR CORRECT
CASE STATUS ONLY
MANDATORY DATE 10/17/97
MANDATORY DATE 10/17/97

111497 0118

CHECK-OUT RECEIPT FOR EXHIBITS
(IN HOUSE)
EVIDENCE RECEIVED BY CHRISTIE
GOODING, FROM R. JERRY OVERLY,
EVIDENCE CLERK ON 11/13/97

111797 0119

CHECK-IN RECEIPT FOR EXHIBITS (IN-HOUSE)
PLTF'S EVIDENCE 1-18 & DEF'S EVIDENCE 1-10 RECEIVED BY R. JERRY OVERLY ON 11/17/97.

*** END OF DOCKET ENTRIES FOR THIS CASE ***

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION.

CASE NO.: CL 6071 AG

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Plaintiff,

vs. (Filed Jun. 8, 1992)

DAVID R. BEACH; LINDA M. BEACH, his wife; BENEFICIAL MORTGAGE CO. OF FLORIDA; SET-N-SUN OWNER'S ASSOCIATION, INC.; The UNITED STATES OF AMERICA, a Governmental Entity; and JOHN DOE and/or JANE DOE,

Defendants,

_____/

COMPLAINT

Plaintiff, GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS, sues the Defendants DAVID R. BEACH; LINDA M. BEACH, his wife, ("Mortgagors"); BENEFICIAL MORTGAGE CO. OF FLORIDA; SET-N-SUN OWNER'S ASSOCIATION, INC.; The UNITED STATES OF AMERICA, a Governmental Entity; and JOHN DOE and/or JANE DOE, and alleges that:

1. This is an action to foreclose a mortgage on real property in Palm Beach County, Florida.

2. Plaintiff GREAT WESTERN BANK, is a Federal Savings Bank and a United States Corporation authorized to do business in the State of Florida.

3. Defendant, DAVID R. BEACH is an individual over the age of eighteen (18) years, residing in Palm Beach County, not in the military, and otherwise sui juris.

4. Defendant, LINDA M. BEACH is an individual over the age of eighteen (18) years, residing in Palm Beach County, not in the military, and otherwise sui juris.

5. Defendant, BENEFICIAL MORTGAGE CO. OF FLORIDA, is a Corporation duly licensed to do business in the State of Florida.

6. Defendant, SET-N-SUN OWNER'S ASSOCIATION, INC., is a not-for-profit Florida Corporation.

7. Defendant, UNITED STATES OF AMERICA is a proper party to this action pursuant to Title U.S.C. 28 Section 2410.

8. Defendants JOHN DOE and/or JANE DOE are individuals, corporation, or other entities who (which) are occupying the property which is the subject of the complaint, the true and correct names of whom (which) are presently unknown to Plaintiff.

9. That on August 15, 1986, Defendant Mortgagors executed and delivered a Note and a Mortgage securing payment of the Note to GREAT WESTERN SAVINGS n/k/a GREAT WESTERN BANK. The Mortgage was recorded on August 21, 1986, in Official Record Book 4980, at Page 152, of the Public Records of Palm Beach County, Florida, and mortgaged the property described in the Mortgage (the "Property") then owned by and in

possession of the Defendant Mortgagors, a copy of the Mortgage and a copy of the Note being attached hereto and incorporated herein as Exhibit "A".

10. Plaintiff owns and holds the Note and Mortgage.

11. The Property is now owned by Defendant Mortgagors who hold possession.

12. Defendant Mortgagors have defaulted under the Note and Mortgage by failing to pay the payment due December 1, 1991, and all subsequent payments.

13. Plaintiff declares the full amount payable under the Note and Mortgage to be due.

14. Defendant Mortgagors owe Plaintiff $94,678.68 that is due on principal on the Note and Mortgage, interest from November 1, 1991, other expenses, including but not limited to, real estate taxes, escrow deficits, and title search expense for ascertaining necessary parties to this action.

15. Defendant, BENEFICIAL MORTGAGE CO. OF FLORIDA, may claim some interest in the Property by virtue of a Mortgage recorded on August 23, 1990, in Official Record Book 6558, at Page 1030, of the Public Records of Palm Beach County, Florida, but that interest is inferior to that of Plaintiff.

16. Defendant, SET-N-SUN OWNERS' ASSOCIATION, INC., may claim some interest in the Property by virtue of assessments, if any, but that interest is inferior to that of Plaintiff.

17. Defendant UNITED STATES OF AMERICA, may claim some interest in the property by virtue of certain Notices of Federal Tax Liens as follows:

a. Notice of Federal Tax Lien recorded on October 9, 1990, in Official Records Book 6603, at Page 1597 of the Public Records of Palm Beach County, Florida. The name and address of the taxpayer whose liability created the Lien is DAVID R. BEACH, 5870 Set-N-Sun Place, Jupiter, Florida 33458. The Notice of Federal Tax lien was filed by Revenue Officer #65-01-0000 and was prepared and signed at Ft. Lauderdale, Florida on October 2, 1990;

b. Notice of Federal Tax Lien recorded on July 26, 1991, in Official Records Book 6904, at Page 542 of the Public Records of Palm Beach County, Florida. The name and address of the taxpayer whose liability created the Lien is DAVID R. BEACH, 5870 Set-N-Sun Place, Jupiter, Florida 33458. The Notice of Federal Tax Lien was prepared and signed June 23, 1991 at Ft. Lauderdale, Florida; and

c. Notice of Federal Tax Lien recorded on August 20, 1991, in Official Records Book 6936, at Page 549 of the Public Records of Palm Beach County, Florida. The name and address of the taxpayer whose liability created the Lien is DAVID R. BEACH, 5870 Set-N-Sun Place, Jupiter, Florida 33458. The Notice of Federal Tax Lien was filed by Revenue Officer #65-01-3414 and was prepared and signed at Ft. Lauderdale, Florida on August 20, 1991.

Copies of the Notices are attached hereto and incorporated herein as Composite Exhibit "B". The interest of Defendant, UNITED STATES OF AMERICA, is inferior to that of Plaintiff.

18. Defendants JOHN DOE and/or JANE DOE may claim some interest in the Property by virtue of occupancy thereof through oral or written leases or other agreements. Plaintiff is not in possession of any such leases or agreements and does not know the terms thereof. Said interests are inferior to that of Plaintiff.

19. All conditions precedent to the bringing of this action have been fulfilled or waived.

20. Plaintiff is obligated to pay its attorneys a reasonable fee for their services for which Defendant Mortgagors are liable pursuant to the Note and Mortgage.

WHEREFORE, Plaintiff demands an accounting of the sum due to Plaintiff under the Note and Mortgage and if the sum is not paid within the time set by this Court, that the Property be sold to satisfy Plaintiff's claim and if the proceeds of the sale are insufficient to pay Plaintiff's claim, that a deficiency judgment be entered for the sum remaining unpaid against the Defendant Mortgagors and that the estate of the Defendants and all

persons claiming under or against the Defendants since the filing of notice of lis pendens be foreclosed.

GARY, DYTRYCH & RYAN, P.A.
Attorneys for: Plaintiff
701 U.S. Highway One, Ste. 402
North Palm Beach, FL 33408
(407) 844-3700

By: /s/ Peter M. Armold
PETER M. ARMOLD, ESQUIRE
Florida Bar No.: 660655

EXHIBITS OMITTED

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO.: CL 92-6071 AG

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendants.

_____/

ANSWER TO PLAINTIFF'S COMPLAINT

NOW INTO COURT, through undersigned counsel, come DAVID R. BEACH and LINDA M. BEACH, his wife, and file this their answer and affirmative defenses to Plaintiff's, GREAT WESTERN BANK, complaint to foreclose a mortgage alleging as follows:

1. Admitted for jurisdiction only.
2. Without knowledge therefore denied.
3. Admitted.
4. Admitted.
5. Without knowledge therefore denied.
6. Without knowledge therefore denied.
7. Without knowledge therefore denied.

8. Without knowledge therefore denied.

9. The mortgage and note attached to Plaintiff's complaint and served upon the Defendants is illegible. Therefore, these Defendants can neither admit nor deny.

10. Without knowledge therefore denied.

11. Plaintiffs admit they now own and reside in and have continuously resided in the premises located at 5870 Set-N-Sun Place, Jupiter, Florida 33458.

12. Denied.

13. Denied.

14. Denied.

15. Without knowledge therefore denied.

16. Without knowledge therefore denied.

17. Without knowledge therefore denied.

18. Without knowledge therefore denied.

19. Denied.

20. Without knowledge therefore denied.

WHEREFORE, Defendants pray this Honorable Court dismiss Plaintiff's complaint with prejudice, taxing costs and fees against Plaintiff. Plaintiff's seek costs and fees pursuant to the mortgage and note, and 15 USC 1601, et. seq. and 15 USC 1640.

IT IS HEREBY CERTIFIED that a true and correct copy has been furnished by mail this 26th day of June, 1992, to PETER M. ARMOLD, ESQ., Gary, Dytrych &

Ryan, P.A., 701 U.S. Highway One, Suite 401, North Palm Beach, Florida 33408.

JAMES A. BONFIGLIO, P.A.
189 Bradley Place
Palm Beach, FL 33480
Mail to: P.O. Box 1489
Boynton Beach, FL 33425
(407) 655-1225 or 734 4503

/s/ James A. Bonfiglio
JAMES A. BONFIGLIO, ESQ.
Fla. Bar No. 288055

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA.

CASE NO. CL 92-6071 AG

GREAT WESTERN BANK, etc.

Plaintiff,

vs.

DAVID R. BEACH, LINDA M BEACH, et al.,

Defendants.

AFFIRMATIVE DEFENSES

NOW INTO COURT, through undersigned counsel, come DAVID R. BEACH and LINDA M. BEACH, the defendants herein, and file their affirmative defenses to Plaintiff's complaint as follows:

1. The plaintiff, GREAT WESTERN BANK, has failed to comply with the Housing and Community Development Act of 1987, 15 U.S.C. Sec. 1701 by failing to provide the proper notice requirements prior to institution of this foreclosure action. Therefore, they are estopped from proceeding with this foreclosure or otherwise have waived their right to foreclose this mortgage.

2. At all times material hereto, this transaction was governed under the Federal Truth in Lending Act, Title 15, U.S.C. Sec. 1601, et seq. (TILA) and subject to the Beachs' right of rescission as described by Sec. 125 of the

Act (15 U.S.C. Sec. 1635) and Reg. Z 226.23 (12 C.F.R. 226.23).

3. In the course of this consumer credit transaction, Great Western violated 15 U.S.C. Sec. 1635(a) and Reg. Z 226.23 by failing to deliver to the Beachs two (2) copies of the notice of the right to rescind which identified the transaction, clearly and conspicuously disclosed the security interest in defendants' principal dwelling, clearly and conspicuously disclosed the defendants' right to rescind the transaction, clearly and conspicuously disclosed how to exercise the rescission right with a form for that purpose, designating the address of Great Western Bank's place of business clearly and conspicuously disclosed the effects of rescission and clearly and conspicuously disclosed the date the rescission period expired.

4. Great Western Bank failed to deliver all material disclosures required by 15 U.S.C. 1601, et seq. and Reg. Z, including the following:

a. failing to properly and accurately disclose the amount financed, using that term in violation of Reg. Z 226.18(b) and 15 U.S.C. 1638(a)(2)(a);

b. failing to clearly and accurately disclose the finance charge using that term, in violation of Reg. Z 226.4 and 226.18(d), 15 U.S.C. Sec. 1638(a)(3);

c. failing to clearly and accurately disclose the annual percentage rate using that term in violation of Reg. Z 226.18(e) and 15 U.S.C. 1638(a)(4);

d. failing to properly disclose the number, amounts and timing of payments scheduled to repay the

obligation in violation of Reg. Z 226.18(g) and 15 U.S.C. 1638(a)(6);

e. failing to clearly and accurately disclose the total of payments using that term in violation of Reg. Z 226.18(h) and 15 U.S.C. 1638(a)(5).

5. The Beachs have a continuing right to rescind the transaction until the third business day after they receive both the notices described in the above paragraphs and all material disclosures described above, pursuant to 15 U.S.C. 1635(a) and Reg. Z 226.23(a)(3). The Beachs hereby notify Great Western Bank of their intention to rescind the transaction and hereby rescind the transaction.

6. As a result of the aforedescribed violations of Act and Reg. Z pursuant to 15 U.S.C. Sec. 1635(a) and 1640(a), Great Western Bank is liable to defendants for rescission of this transaction, termination of any security interest in the Beachs' property created under the transaction, return of any money or property given by the Beachs to anyone including Great Western Bank in connection with this transaction, twice the finance charge in connection with this transaction, not less than $100 nor more than $1000, the right to retain proceeds to vest in the Beachs, actual damages in an amount to be determined at trial and reasonable attorney fees under TILA.

WHEREFORE, the Beachs pray this Honorable Court take jurisdiction over this matter, dismiss Great Western's complaint with prejudice, taxing costs and fees against Great Western under the mortgage note and under TILA, rescind the transaction described above, order Great Western to take all action necessary to terminate any security interest in the Beachs' property created under

the transaction and the Court declare all such security interest void, including but not limited to the mortgage related to the transaction described above, order the return to the Beachs of any money or property given by the Beachs to anyone including Great Western Bank, enjoin Great Western during the pendency of this action and permanently thereafter from instituting, prosecuting or maintaining foreclosure proceedings on the Beachs' property, from recording any deeds or mortgages regarding the property or from otherwise taking any steps to deprive the Beachs of ownership of that property, award the Beachs twice the finance charge in connection with this transaction in an amount not less than $100 nor mote [sic] than $1000, order that the right to retain proceeds vests in the defendants, award actual damages to be established at trial and award the defendants costs and reasonable attorney fees as provided under 15 U.S.C. 1640(a) and such other relief as this Honorable Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. Mail, to PETER M. ARMOLD, ESQ., 701 U.S. Highway One, Suite 401, N. Palm Beach, Florida 33408 this 16th day of June, 1992.

JAMES A. BONFIGLIO, P.A.
189 Bradley Place
Palm Beach, FL 33480
Mailing address: P.O. Box 1489
Boynton Beach, FL 33425
(407) 655-1225

By /s/ James A. Bonfiglio
JAMES A. BONFIGLIO
Florida Bar Member No. 288055

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION.

CASE NO.: CL 92-6071 AC

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH; LINDA M. BEACH, his wife; etc.,

Defendants.

_____/

PLAINTIFF'S REPLY TO DEFENDANTS DAVID R. BEACH & LINDA M. BEACH'S AFFIRMATIVE DEFENSES.

COMES NOW, Plaintiffs GREAT WESTERN BANK, by and through its undersigned counsel, pursuant to Rule 1.100(a), Florida Rules of Civil Procedure and replies to the affirmative defenses stated in DAVID R. BEACH and LINDA M. BEACH'S (collectively, "Beach") answer to the complaint served by mail June 26, 1992, as follows:

1. Plaintiff denies all the allegations contained in the Beach answer to the complaint.

2. For a further reply, Plaintiff affirmatively alleges the following:

a. It is the Plaintiff's business practice to, and Plaintiff did in fact, give to the Beach notice of home ownership counseling pursuant to 12 U.S.C. Section 1701.

b. Plaintiff did deliver to the Beachs a notice of the right of recession as required by 15 U.S.C. Section 1535(a) and Reg. 2226.23. A copy of the rescission notice is attached hereto and incorporated herein as Exhibit "A".

c. Plaintiff did deliver all material disclosures required by 15 U.S.C. Section 1601, et.seq. and Reg. Z. A copy of the disclosure statement is attached hereto and incorporated herein as Exhibit "B".

d. Title 15 U.S.C. Section 1601, et.seq. does not apply to the transaction because it is expressly excepted out and among other things the Beachs are bared [sic] by the time limitations provided for in 15 U.S.C. Section 1601 and Reg. Z 226.23.

WHEREFORE, Plaintiff requests judgment that the Beach's affirmative defenses be dismissed and that Plaintiff have judgment against the Defendants.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, to: **JAMES A BONFIGLIO,** P.A., attorney for Beach, 189 Bradley Place, Palm Beach, Florida 33080, P.O. Box 1489, Boynton Beach, Florida 33425 and **JOSEPH K. STILL, JR., P.A.,** attorney for Beneficial 1551 Forum

Place, Suite 500E, West Palm Beach, Florida 33401, on the 17th day of JULY, 1992.

GARY, DYTRYCH & RYAN, P.A.
Attorneys for: Plaintiff
701 U.S. Highway One, Ste.402
North Palm Beach, FL 33408
(407) 844-3700

/s/ Peter M. Armold
PETER M. ARMOLD, ESQUIRE
Florida Bar No.: 660655

EXHIBITS OMITTED

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly
GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendants.

_____/

MOTION TO AMEND PLAINTIFF'S REPLY TO DEFENDANTS, DAVID R. BEACH and LINDA M. BEACH'S AFFIRMATIVE DEFENSES

Plaintiff, GREAT WESTERN BANK, files this motion pursuant to Rule 1.190 of the Florida Rules of Civil Procedure to amend its reply to the Defendants', DAVID R. BEACH and LINDA M. BEACH's Affirmative Defenses, and states:

1. On July 20, 1992, a reply to Defendants' Affirmative Defenses was filed by predecessor counsel for the Plaintiff.

2. After further investigation of the claims asserted by those Defendants, Plaintiff has determined that it is necessary to clarify some of those matters set forth in the reply previously filed and to add as further replies to

those affirmative defenses, a bona fide error defense pursuant to 15 U.S.C. § 1640(c) and an exemption from the right to rescind.

3. This case has not been set for trial and Defendants will suffer no prejudice by permitting Plaintiff to so amend the pleadings.

4. The proposed Amended Reply to Affirmative Defenses is attached hereto as Exhibit "A".

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent ***via telefax*** and regular mail to JAMES A. BONFIGLIO, P.A., 189 Bradley Place, Palm Beach, Florida 33480 and via regular mail to JOSEPH K. STILL, JR., P.A., 1551 Forum Place, Suite 500E, West Palm Beach, Florida 33401 this 14th day of July, 1993.

BROAD AND CASSEL
Attorneys for the Plaintiff
Reflections Centre, 5th Floor
400 Australian Avenue South
West Palm Beach, Florida 33401
Telephone: (407) 832-3300

By: /s/ Steven Ellison
STEVEN ELLISON
Florida Bar No. 510319

EXHIBIT
"A"

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly
GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendants.
_____/

PLAINTIFF'S AMENDED REPLY TO DEFENDANTS, DAVID R. BEACH and LINDA M. BEACH'S AFFIRMATIVE DEFENSES

Plaintiff, GREAT WESTERN BANK, pursuant to Rule 1.100(a) of the Florida Rules of Civil Procedure replies to the Affirmative Defenses stated in DAVID R. BEACH and LINDA M. BEACH's Answer and Affirmative Defenses, and states:

1. Plaintiff provided to DAVID R. BEACH and LINDA M. BEACH a Notice of Homeownership Counseling pursuant to 12 U.S.C. § 1701.

2. In accordance with 15 U.S.C. § 1635(f), Defendants' right of rescission expired three years after the date of consummation of the transaction (August 15,

1989) and by virtue of that expiration, their claim for rescission pursuant to 15 U.S.C. § 1635 is time barred.

3. Pursuant to 15 U.S.C. § 1640(c), a creditor may not be held liable in any action brought under Section 125, (15 U.S.C. § 1635) if the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

4. GREAT WESTERN had and continues to have in place, a procedure to avoid clerical errors which includes double-checking of documents by a processing supervisor or manager and complete training to employees regarding compliance with the Truth-in-Lending Act.

5. If an error was made in the disclosure to the Defendants of their right to cancel the transaction, such error was unintentional and the product of a bona fide clerical mistake for which GREAT WESTERN maintained reasonable procedures to avoid.

6. This transaction constituted a residential mortgage transaction exempted from the right of rescission under 15 U.S.C. § 1635(e)(1).

BROAD AND CASSEL
Attorneys for the Plaintiff
Reflections Centre, 5th Floor
400 Australian Avenue
South West Palm Beach, Florida 33401
Telephone: (407) 832-3300

By: /s/ Steven Ellison
STEVEN ELLISON
Florida Bar No. 510319

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly
GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendants.
_____/

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND PLAINTIFF'S REPLY TO DEFENDANTS, DAVID R. BEACH and LINDA M. BEACH'S AFFIRMATIVE DEFENSES

THIS CAUSE having come before the Court on Plaintiff's Motion to Amend Plaintiff's Reply to Defendants, DAVID R. BEACH and LINDA M. BEACH's Affirmative Defenses, and after hearing argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. Said motion is GRANTED.

2. Plaintiff's Reply to Defendants, DAVID R. BEACH and LINDA M. BEACH's Affirmative Defenses shall be deemed filed as of the date of this Order.

DONE AND ORDERED in Chambers in West Palm Beach, Palm Beach County, Florida, this ____ day of July, 1993.

_____
CIRCUIT COURT JUDGE

Copies Furnished:

STEVEN ELLISON, ESQ., Broad and Cassel, 400 Australian Avenue
South, Suite 500, West Palm Beach, Florida 33401
JAMES A. BONFIGLIO, P.A., 189 Bradley Place, Palm Beach, Florida 33480
JOSEPH K. STILL, JR., P.A., 1551 Forum Place, Suite 500E, West Palm Beach, Fl 33401

SIGNED & DATED

JUL 16 1993

Judge Thomas E. Sholts

IN THE CIRCUIT COURT OF THE I5TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly
GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendants.

_____/

PRETRIAL STIPULATION

Plaintiff, GREAT WESTERN BANK and Defendants, DAVID R. BEACH and LINDA M. BEACH, in accordance with this Court's Pretrial Order dated July 13, 1993, submit this Pretrial Stipulation and state:

I. FACTS

1. On August 15, 1986, Plaintiff loaned the Defendants the principal sum of $97,300.00 for which Defendants executed a Promissory Note and Mortgage on their principal residence.

2. The proceeds of the loan were used to satisfy a preexisting construction loan from First Federal Savings which was utilized to pay for the construction of the Defendants' primary residence.

3. On November 1, 1991, Defendants failed to make the payment due in accordance with the Promissory Note and Mortgage and have not made any other payments due since that time.

4. Defendants acknowledge that they are in default under the terms of the subject Note and Mortgage and, subject to their claims under the Truth-in-Lending Act, they agree that the Plaintiff is entitled to a judgment against them in the undisputed amount of $116,801.77 through October 7, 1993.

II. QUESTIONS OF LAW OR FACT UPON WHICH THE PARTIES HAVE STIPULATED

1. The Defendants have defaulted under the terms of the Promissory Note and Mortgage.

2. There is presently due and owing under the Promissory Note and Mortgage, the sum of $94,678.68 as principal, $15,469.58 as interest through October 7, 1993, $897.16 as late fees and $5,756.35 for property taxes and tax advance fees, making a total of $116,801.77, with a per diem of $24.511. Additionally, costs and attorney's fees are to be assessed under the terms of the Note and Mortgage subject to the Court's ruling on entitlement and reasonableness.

3. The subject loan transaction involved the Defendants' primary residence.

4. The loan with First Fidelity involved the financing of the construction of the Defendants' principal residence.

5. The Defendants received from the Plaintiff, the following Truth-in-Lending Disclosure documents:

A. Notice of Right to Cancel

B. Loan Disclosure

C. Itemization of Amount Financed

D. Good Faith Estimate of Itemization of Amount Financed

E. Federal Truth-in-Lending Disclosure Statement

F. Good Faith Estimate of Disclosure Statement

G. Consumer Handbook

H. Special ARM Notice

III. QUESTIONS OF LAW OR FACT TO BE DECIDED AT TRIAL

1. Whether the subject transaction was subject to the right of rescission as defined in 15 U.S.C. §1635(a) and whether the recitation in the loan commitment of the right of rescission obligated the Plaintiff to give that right.

2. Whether the rescission claim of the Defendants is barred by the limitation set forth in 15 U.S.C. §1635(f).

3. Whether Plaintiff provided the Defendants the wrong form of Notice of Right to Cancel at the time of the subject transaction.

4. Whether Plaintiff is entitled to the protection of 15 U.S.C. §1640(c) by virtue of a showing that any error in

providing the Defendants with the wrong form of the Notice of Right to Cancel was bona fide in nature, not intentional, and occurred notwithstanding the maintenance of procedures designed to avoid such errors.

5. Whether the annual percentage rate and finance charge are disclosed in a more conspicuous manner than any other disclosure.

6. Whether designating disclosures with an asterisk which is defined as "means estimate", violates 12 C.F.R. §226.17.

7. Whether the failure to include dollar signs in the payment schedule violates the Truth-in-Lending Act.

8. Whether the inclusion of extraneous symbols in the annual percentage rate box and the statement that the Defendants' initial contract interest rate was 8.750%, appearing on the Truth-in-Lending Disclosure Statement violates 12 C.F.R. § 226.

9. Whether Defendant is entitled to rescind the subject transaction and if so, the method for accomplishing such rescission.

10. Whether Defendant is entitled to statutory damages and if so, in what amount.

11. Whether Defendant is entitled to actual damages and if so, in what amount?

12. Whether the Defendant is entitled to attorney's fees and costs and if so, in what amount?

13. Whether the Plaintiff is entitled to attorneys fees and costs and if so, in what amount?

ATTORNEYS TO TRY CASE

Broad and Cassel
Attorneys for the Plaintiffs
Reflections Centre, 5th Floor
400 Australian Avenue South
West Palm Beach, Fl 33401
Telephone: (407) 832-3300

By: /s/ Steven Ellison
STEVEN ELLISON
Florida Bar No. 510319

James A. Bonfiglio, P.A.
Attorney for the Defendants
P.O. Box 1489
Palm Beach, Fl 33480
Telephone: (407) 734-4503

By: /s/ James A. Bonfiglio
JAMES A. BONFIGLIO
Florida Bar No. 288055

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK,
formerly GREAT
WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and
LINDA M. BEACH, his
wife,

Defendants.
_____/

FINAL JUDGMENT OF FORECLOSURE

THIS MATTER came before the court for trial without a jury on October 20, 1993. After the presentation of testimony, review of the documentary evidence, hearing argument of counsel and being duly advised in the premises, the court makes the following findings of fact:

1. On December 4, 1985, DAVID AND LINDA BEACH (the "BEACHES"), closed on a construction loan with Fidelity Federal Savings Bank of Florida.

2. The funds were to be used to build a home on a vacant lot they had purchased in Jupiter on June 22, 1981.

3. On August 15, 1986, the BEACHES entered into a consumer credit transaction with GREAT WESTERN

BANK ("GREAT WESTERN") in order to satisfy the construction loan from Fidelity Federal and to provide permanent financing for the acquisition of their home.

4. The BEACHES received numerous documents at closing, including a Federal Truth-in-Lending Act ("TILA") Disclosure Statement, a Closing Statement, a Three Day Notice of Right to Cancel, a VRM II T-Bill Rate Disclosure Statement, a Special VRM Notice, an Itemization of Amount Financed, a Good Faith Estimate of the Itemization of the Amount Financed, a Good Faith Estimate of the Truth-in-Lending Disclosure Statement and other disclosure documents.

5. Due to the variable rate feature of the note, GREAT WESTERN changed the interest rate on a yearly basis.

6. On December 1, 1991, the BEACHES defaulted on the loan by failing to make payment on the note.

7. Previously, the BEACHES had made $52,376.71 in payments and late charges to GREAT WESTERN.

8. The parties have stipulated that as of October 20, 1993, the BEACHES owe GREAT WESTERN $116,801.77.

9. GREAT WESTERN initiated foreclosure proceedings and the BEACHES asserted, as an affirmative defense, that GREAT WESTERN violated TILA.

10. The Notice of Right to Cancel form given to the BEACHES was the incorrect form.

11. The distribution of the wrong form to the BEACHES was the result of an unintentional bona fide error which did not constitute an error of legal judgment

with respect to Plaintiff's obligations under the Truth-in-Lending Act.

12. In accordance with the testimony of Cindy Newman, Plaintiff maintained procedures reasonably adapted to avoid the distribution of incorrect rescission forms.

13. The BEACHES did not seek to rescind the GREAT WESTERN mortgage until after the institution of this foreclosure action.

ISSUES PRESENTED

A. Whether GREAT WESTERN has violated the Truth-in-Lending Act by failing to make the proper disclosures to the BEACHES when they consummated the August 15, 1986 loan.

B. What remedies are available to the BEACHES for any violations of the Federal Truth-in-Lending Act?

LEGAL ANALYSIS

A. Whether GREAT WESTERN Violated TILA by Failing to Make the Proper Disclosures to the BEACHES When They Consummated the August 15, 1986 Loan?

(1) More Conspicuous Rule.

15 U.S.C. § 1632(a) provides as follows: "The terms annual percentage rate and finance charge shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction,

except information relating to the identity of the creditor." The BEACHES allege that GREAT WESTERN violated this subsection because it "used the same or smaller print size, style type and boldness for APR and FC as it did for "your initial contract rate is", "means estimate" and other typed in language." Although the print size, style type and boldness of the numbers themselves appear to be the same as other disclosures on the TILA statement, both the APR and FC are surrounded by a large bold box that sets these items apart from the other disclosures. The boxes are printed in bolder print than the boxes surrounding the amount financed and total of payments. In *Flesher v. Household Finance Corp.*, 640 F.2d 861, 862 (6th Cir. 1980), the Sixth Circuit held that the lender did not violate TILA by highlighting the APR and FC in such a manner:

> We agree with the District Court that HFC complied with the Act by putting the "finance charge" and the "annual percentage rate" in a box with a heavy black line. *The highlighting of the "annual percentage rate" and the "finance charge" by placing them in black boxes, constitutes a clear and conspicuous disclosure of such terms. Frank v. Reserve Consumer Discount Co.*, 398 F.Supp. 703 (W.D. Pa. 1975). (Emphasis added).

The cases cited by the BEACHES are distinguishable because the APR and FC were not printed more conspicuously than the other terms. In this case, the fact that the APR and FC were each in a box with a heavy black line and that these boxes with heavy black lines were not used with any of the other disclosures, made the APR and FC "more conspicuously" disclosed than the other terms of

the loan. Therefore, this Court finds that GREAT WESTERN did not violate the "more conspicuous" rule.

(2) Initial Contract Interest Rate Disclosure

GREAT WESTERN placed the symbol "++" next to the APR disclosure of 8.82%. Underneath the FC box, GREAT WESTERN made the following disclosure: "++ YOUR INITIAL CONTRACT RATE IS 8.750%." The BEACHES argue that, by placing the "++" in the federal box and typing in "YOUR INITIAL CONTRACT RATE IS 8.75%" immediately below that, but outside the federal box, GREAT WESTERN violated the segregation requirement found in § 226.17(a)(1) of Regulation Z which states as follows:

> The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required under § 226.18.

In *In re: Cook*, 76 B.R. 661 (Bankr. C.D. Ill., 1987), the Illinois court stated that § 226.17(a) contains two requirements:

> First, the disclosures must be made clearly and conspicuously, and second, the disclosures must be grouped together, be segregated from everything else and not contain any information not directly related to the required disclosures.

Because the required disclosures have been made clearly and conspicuously, the crux of the BEACHES' argument

is that the second requirement of § 226.17(a), that "the disclosures must be grouped together, be segregated from everything else and not contain any information not directly related to the required disclosures" has not been met.

The Official Staff Commentary to § 226.17(a)(1)-4 contains the following comment on the segregation rule:

> ***Content of segregated disclosures.*** Footnotes 37 and 38 contain exceptions to the requirement that the disclosures under § 226.18 be segregated from material *that is not directly related to those disclosures.* Footnote 37 lists the items that may be added to the segregated disclosures, *even though not directly related to those disclosures.* Footnote 38 lists the items required under § 226.18 that may be deleted from the segregated disclosures and appear elsewhere. Any one or more of these additions or deletions may be combined and appear either together with or separate from the segregated disclosures . . . (Emphasis added).

Thus, according to this comment, as well as *Cook* and the plain language of § 226.17(a)(1), § 226.17(a)(1) does *not* mandate that the disclosures required by § 226.18 be segregated from all other information. Material that is directly related to the disclosures can be included with the disclosures.

The initial contract rate is clearly directly related to the annual percentage rate of the loan. The annual percentage rate is a function of the initial contract rate and the subsequent changes in the initial contract rate. Additionally, the initial contract rate was not listed in the federal box next to the annual percentage rate. If it was, it

could confuse and mislead the borrower. The initial contract rate is set apart from the APR and located under the APR federal box. The only extraneous figure in the federal box is "++" which is a reference to the initial contract rate. Furthermore, in *In re: Jones*, 79 B.R. 233, 236 (Bankr. E.D. Pa., 1987), the court held that the inclusion of an extraneous figure, "$4,105.00", did not entitle the debtor to damages or rescission under TILA:

> In order to successfully assert a TILA claim for damages, whether in the nature of recoupment or otherwise, TILA violations in the disclosure statement must be among those enumerated in 15 U.S.C. § 1640(a)(3). In order to give rise to a right to rescind, violations of the TILA must appear in the notice of the rescission right itself or must constitute a "material violation" of the TILA, as defined in 15 U.S.C. § 1602(u) . . .
>
> The third asserted violation, the inclusion of the extraneous figure in the "federal box" in purported violation of 12 C.F.R. § 226.17(a), was factually disputed by the lender, who claims that the extraneous figure, the recitation of the $4,105.00 net figure which the debtor received, appeared only in an internal copy of the disclosure statement retained by the lender and not on the significant copy, i.e., the one delivered to the Debtor. Putting aside the factual issue of whether the $4,105.00 figure appeared on the debtor's copy or not, an issue which we cannot resolve on this record, it is apparent that the appearance of this figure, at most a technical violation of 12 C.F.R. § 226.23(a), would not be within the scope of 15 U.S.C. § 1640(a)(3) or 12 C.F.R. § 226.23(a)(3).

Finally, the three cases cited by the BEACHES in support of their argument, *Mason v. General Finance Corp.*, 542 F.2d 1226 (4th Cir. 1976); *In re: Orr*, 697 F.2d 1011 (11th Cir. 1983); and *Friend v. Termplan*, 651 F.2d 1012 (5th Cir. 1981); are distinguishable from the instant case because (1) those cases are inapplicable since they were decided before TILA was amended by the Truth-in-Lending Simplification and Reform Act of 1980, and (2) the cases involved state terms which were inconsistent and incompatible with the federal disclosures mandated by TILA. In this case, "Initial Contract Rate" is not a term required by Florida law to be disclosed on the disclosure statement and it is not inconsistent with the APR so as to confuse or mislead the consumer. GREAT WESTERN might have violated TILA if it had used the term "Contract Rate" rather than "Initial Contract Rate". *Cook*, although a post-simplification case, is also distinguishable from the instant case because that case involved the failure of the lender to clearly and conspicuously disclose a security interest in a car and to segregate this information in the federal box. *Cook* did not involve a situation where information required by TILA was clearly and conspicuously disclosed in the federal box and other information not required by TILA was listed outside the federal box. Therefore, this Court finds that GREAT WESTERN did not violate TILA when it disclosed the initial contract rate on the TILA disclosure statement.

(3) Annual Percentage Rate, Finance Charge, Amount Financed, Total of Payments and Payment Schedule

Both parties agree that GREAT WESTERN misstated the APR by 0.035%, the finance charge by $201.84, the total of payments by $201.84, and the 348 payments in the payment schedule by 58 cents each. GREAT WESTERN argues that these misstatements did not violate TILA because they are all related to the misstatement of the APR and the deviation of the APR is within the tolerable limits allowed by TILA. 15 U.S.C. § 1606 explains that TILA permits a deviation in the APR of 0.125%:

> The disclosure of an annual percentage rate is accurate for the purpose of this title if the rate disclosed is within a tolerance not greater than one-eighth of 1 per centum, more or less than the actual rate or rounded to the nearest one-fourth of 1 per centum. The Board may allow a greater tolerance to simplify compliance where irregular payments are involved.

Because the APR is misstated by only .03%, and 15 U.S.C. § 1606 permits a tolerance of .125%, the APR disclosure is accurate. However, footnote 41 to Regulation Z, § 226.18(d) indicates that the finance charge disclosure is not accurate:

> *The finance charge shall be considered accurate if it is* not more than $5.00 above or below the exact finance charge in a transaction involving an amount financed of $1,000.00 or less, or *not more than $10.00 above or below the exact finance charge in a transaction involving an amount financed of more than $1,000.00.* (Emphasis added)

In this transaction, the finance charge is misstated by $201.84. In *Steele v. The Ford Motor Credit Co.*, 783 F.2d 1016 (11th Cir. 1986), Ford understated the finance charge by $24.00. The 11th Circuit held that this understatement constituted a material violation of TILA and that the consumer could rescind the loan:

> Ultimately, however, whether the understatement was $24.00 or $32.00 is of no consequence. An examination of our precedents reveals that in this circuit any understatement of the finance charge is a material non-disclosure, although the possibility of a de minimis exception has not been ruled out . . .
>
> . . . .
>
> We believe that *Bustamante, Harris* and *Davis,* may be read consistently with each other for the proposition that any understatement of the finance charge is material *because* any understatement would be of some significance to a reasonable consumer. Although this proposition assumes that the finance charge is somehow more important than other required disclosures, that assumption makes sense. The finance charge is the total cost of the loan to the borrower. Although other factors might also be relevant, cost would likely be of prime importance to most reasonable consumers shopping for loans.
>
> Since Ford's retention of unearned interest resulted in non-disclosure of the proper finance charge on the second loan, since any understatement of the finance charge is material under our precedents, we reverse the district court's grant of summary judgment for Ford and remand for

> further proceedings consistent with this opinion.

Id. at 1018-1020. The court noted that although footnote 41 did not govern the Ford loan, the court "would likely reach the same result if they (the footnote) did apply since the finance charge for the loan was understated by more than $10.00". *Id.* at 1019. Therefore, the disclosed finance charge is not accurate, and GREAT WESTERN has violated TILA. *See also, Gallegos v. Stokes,* 593 F.2d 372 (10th Cir. 1979) (accepting the findings of the trial court that the disclosure provisions of TILA were violated by overstating the finance charge by $28.96, as well as by overstating the annual percentage rate and the monthly payment).

GREAT WESTERN cites the Federal Reserve Board's Truth-in-Lending Policy Guide ("Policy Guide") for the proposition that if the finance charge is misstated because the APR is misstated, and the APR deviation is within the tolerable limits allowed by TILA, then the misdisclosure of the finance charge is not a violation of TILA. The Policy Guide defines *"Understated Finance Charge"* as follows:

> *"Understated finance charge"* means a disclosed finance charge which, when increased by a numerical tolerance that is generated by the corresponding APR tolerance is less than the finance charge calculated under the Act.

Footnote 1 to this definition provides as follows:

> Finance charge tolerance: The finance charge tolerance for each loan will be generated by the corresponding APR tolerance applicable to that loan. For example, consider a single-payment loan with a one year maturity which is subject to a one quarter of one percent APR tolerance. If the amount financed is $5,000.00 and the finance charge is $912.50, the APR will be 18.25%. The finance charge generated by the APR of 18% on that loan would be $900.00. The difference between $912.50 and $900.00 produces a numerical finance charge tolerance of $12.50. If the disclosed finance charge is not understated by more than $12.50, reimbursement would not be ordered.

The Policy Guide, promulgated pursuant to 15 U.S.C. § 1607, is used to determine if restitution is appropriate when the finance charge is understated in cases in which "the Federal Reserve Board acts on its own initiative . . . as a policeman over its member banks." *Ratner v. Chemical Bank New York Trust Company,* 309 F.Supp. 983, 986 (S.D. N.Y. 1969). It does not apply when a private party, pursuant to 15 U.S.C. § 1640, brings a civil action for damages or rescission under TILA. The Policy Guide does not state that the finance charge disclosure is "accurate" if it is within the numerical tolerance generated by the corresponding APR tolerance; it merely states that restitution is not appropriate in such cases. Therefore, because Footnote 41 of Regulation Z, § 226.18(d) is the proper measure of accuracy, this court should rule that GREAT WESTERN violated TILA when it misdisclosed the finance charge by $201.84, the total of payments by the same amount, and the payment amount for the last 348 payments listed on the payment schedule by $.58 cents.

(4) Use of Estimates

GREAT WESTERN placed an asterisk following the TILA numbers in the annual percentage rate disclosure, the finance charge disclosure, the amount financed disclosure, the total of payments disclosure, and the payment schedule disclosure of 348 payments at $755.23. The disclosure statement indicates that: "* MEANS ESTIMATE." The BEACHES assert that GREAT WESTERN misdisclosed the variable rate feature by disclosing those figures as estimates which violated TILA. Section 226.17(c)(2) of Regulation Z states:

> (c) ***Basis of disclosures and use of estimates.***
>
> (2) If any information necessary for an accurate disclosure is unknown to the creditor, it shall make the disclosure based on the best information reasonably available and shall state that the disclosure is an estimate.

With respect to variable rate transactions, paragraph 17(1)-9 of the Official Staff Commentary to § 226.17 provides as follows:

> ***9. Use of estimates in variable rate transactions.***
>
> The variable rate feature does not, by itself, make the disclosures estimates.

The BEACHES assert that GREAT WESTERN erred in labelling the numerical disclosures as estimates because a lender cannot label those numerical disclosures as estimates merely because the parties have entered into a variable rate transaction. GREAT WESTERN correctly cites *In re: Jones, supra,* for the proposition that disclosing

figures as estimates does not violate TILA when the disclosure statement contains the actual figures. However, as indicated above, both parties agree that some of the disclosed figures were inaccurate (overstated). Therefore, this case is distinguishable from *Jones.* Where actual figures are available, and the lender discloses estimated or incorrect figures, the lender violates TILA. *See, In re: Mitchell,* 75 B.R. 593 (Bankr. E.D. Pa., 1987). Therefore, because GREAT WESTERN inaccurately portrayed the payment schedule, the annual percentage rate, the finance charge, the amount financed, and the total of payments as estimates, GREAT WESTERN violated TILA.

(5) Dollar Signs

The BEACHES cite *Flesher v. Household Finance Corp., supra,* for the proposition that the failure to use dollar signs in the payment schedule violates the "clear and conspicuous" rule. However, *Flesher* is distinguishable from the instant case because the lender in *Flesher* failed to include a dollar sign before the "default and deferment charge". Because of this omission, the borrower could have interpreted the amount disclosed as percentage or some other charge. As a result, "plaintiffs did not know the charges to be paid upon their default or deferment under th[e] loan agreement." *Id.* at 862. In this case, it is clear that the "765.46" and "755.23" mean "$765.46" and "$755.23", especially in light of the fact that these numbers were in the "Amount of Payments" column. Therefore, GREAT WESTERN did not violate the "clear and conspicuous rule of TILA" by failing to place dollar signs in the payment schedule.

(6) Intangible Tax

The BEACHES contend that GREAT WESTERN misdisclosed the amount financed by improperly including the intangible tax in the amount financed and excluding the sum from the finance charge. Therefore, GREAT WESTERN violated TILA by overstating the amount financed and understating the finance charge. Regulation Z, § 226.4(a) defines "Finance Charge" as follows:

> The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

The intangible tax on the mortgage is clearly a "charge . . . imposed . . . as an incident to or a condition of the extension of credit." If the BEACHES paid for the property in full with cash, the tax would not be charged to the BEACHES because there would be no mortgage. Thus, it is not a "charge of a type payable in a comparable cash transaction." Furthermore, the Official Staff Commentary to § 226.4(a) states:

> 1. *Charges in comparable cash transactions.* Charges imposed uniformly in cash and credit transactions are not finance charges. In determining whether an item is a finance charge, and creditor should compare the credit transaction in question with a similar cash transaction. A creditor financing the sale of property or services may compare charges with those payable in a similar cash transaction by the seller of the property or

> service. For example, the following items are not finance charges:
>
> *Taxes*, license fees, or registration fees, *paid by both cash and credit customers*. (Emphasis added).

This comment supports the conclusion that the mortgage intangible tax is a finance charge because the tax would not be incurred by a cash buyer.

GREAT WESTERN cites Regulation Z § 226.4(e)(1) for the proposition that certain taxes and fees paid to public officials for perfecting the security interest can be excluded from the finance charge. § 226.4(e)(1) provides as follows:

> (e) ***Certain Security Interest Charges.***
>
> If itemized and disclosed, the following charges may be excluded from the finance charge:
>
> (1) Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing or satisfying a security interest.

The Official Staff Commentary to that section states:

> 4(e) Certain Security Interest Charges
>
> 1. *Examples:* Examples of charges excluded from the finance charge under 226.4(e)(1) include:
>
> Charges for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents.
>
> Stamps evidencing payment of taxes on property if the stamps are required to file a security agreement on the property.

The payment of the intangible tax is not required to "determin[e] the existence of or for perfecting, releasing, or satisfying a security interest." The tax is not a "[c]harge for filing or recording" the mortgage. Furthermore, the intangible tax is not a documentary stamp tax. *See*, 53 *FLA. JUR. 2d, Taxation* § 29:5 (although the same transaction often triggers both taxes, there are distinct differences between the stamp tax and the intangible tax). Therefore, GREAT WESTERN violated TILA because the intangible tax charge of $194.16 was improperly included as part of the amount financed.

B. What Remedies are Available to the BEACHES for Any Violations of the Federal Truth-in-Lending Act?

(1) Introduction

In *Smith v. Fidelity Consumer Discount Company*, 898 F.2d 896, 898 (3rd Cir. 1989), the Second Circuit succinctly stated the purposes of the Federal Truth-in-Lending Act and the remedies available to consumers for TILA violations:

> Through TILA, Congress sought to remedy the "divergent and often fraudulent practices by which credit customers were apprised of the terms of the credit extended to them." *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 262 (3rd Cir. 1975). Indeed, the congressionally stated purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." 15 U.S.C. § 1601(a) . . .

> TILA achieves its remedial goals by a system of strict liability in favor of the consumers when mandated disclosures have not been made. 15 U.S.C. § 1640(a). A creditor who fails to comply with TILA in any respect is liable to the consumer under the statute regardless of the nature of the violation or the creditor's intent. *Thomka v. A.A. Chevrolet, Inc.*, 619 F.2d 246, 249-50 (3rd Cir. 1980). "[O]nce the court finds a violation, no matter how technical, it has no discretion with respect to liability." *Grant v. Imperial Motors*, 539 F.2d 506, 510 (5th Cir. 1976).
>
> A single violation of TILA gives rise to full liability for statutory damages. Damages include actual damages incurred by the debtor plus a civil penalty equal to double the finance charge up to a maximum of $1,000.00. 15 U.S.C. § 1640(a)(1)(2)(A)(i). Multiple violations of TILA in the course of a single loan transaction do not yield multiple civil penalties but result in only a single penalty. 15 U.S.C. § 1640(g).
>
> In addition, when a creditor takes a security interest against property which is the principal dwelling of the debtor, the debtor has the right to rescind the transaction until the later of (1) midnight of the third day following the transaction or (2) the date on which the creditor delivers to the consumer the notice of the right of rescission and the material disclosures that TILA requires. 15 U.S.C. § 1635. Exercise of the right to rescind under § 1635 results in discharge of the consumer's liability for any finance charge or other charge and in discharge of any security interest taken in conjunction with the extension of creditor. 15 U.S.C. § 1635(b).

(2) Rescission

15 U.S.C. § 1635 governs the borrower's right to rescind a consumer credit transaction. § 1635 provides as follows:

> ***Disclosure of Obligor's Right to Rescind***
>
> Except as otherwise provided in this section, *in the case of any consumer credit transaction* (including opening or increasing the credit limit for an open-end credit plan) *in which a security interest,* including any such interest arising by operation of law, *is or will be retained or acquired in any property which is used as the principal dwelling of the other person to whom credit is extended, the obligor shall have the right to rescind the transaction* until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this subchapter, whichever is later. . . . (Emphasis Added).

However, § 1635(e)(1) states that:

> This section does not apply to:
>
> (1) a residential mortgage transaction defined in § 103(W).

Section 103(W) (15 U.S.C. § 1602(W)) defines a "residential mortgage transaction" as:

> a transaction in which a mortgage . . . or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling.

The key issue is whether the instant transaction is one in which a mortgage was created to finance the acquisition or initial construction of the consumer's dwelling. Paragraph 2 of the Pretrial Stipulation submitted by both parties provides as follows:

> The proceeds of the loan were used to satisfy a preexistng construction loan from First Federal Savings which was utilized to pay for the construction of the Defendants' primary residence.

In regard to construction loans and permanent financing, paragraph 2(a) (24)-4 of the Official Staff Commentary to § 226.2(a) provides in part as follows:

> *Construction financing.* If a transaction meets the definition of a residential mortgage transaction and the creditor chooses to disclose it as several transactions under § 226.17(c)(6), each one is considered to be a residential mortgage transaction even if different creditors are involved. For example:
>
> . . . .
>
> One creditor finances the initial construction of the consumer's principal dwelling and another creditor makes a loan to satisfy the construction loan and provide permanent financing. Both transactions are residential mortgage transactions.

According to the Pretrial Stipulation in this case, First Fidelity financed the initial construction of the BEACHES' home and GREAT WESTERN made their loan to satisfy First Fidelity's construction loan and to provide permanent financing. The staff commentary provides that

both loans, the First Fidelity loan and the GREAT WESTERN loan, are residential mortgage transaction [sic]. Therefore, the BEACHES are not entitled to rescind the instant loan transaction.

In addition, 15 U.S.C. § 1635(f) limits the existence of the right of rescission to three years after the consummation of the mortgage transaction. The BEACHES' failure to raise a rescission claim on or before August 15, 1989, would be absolutely fatal to any right to rescind which they would have had if this were not a residential mortgage transaction exempt under 15 U.S.C. § 1635(e)(1). This court is unconvinced by the rationale of *Dawe v. Merchants Marine*, 683 P.2d 796 (Colo. 1984) and its progeny. Congress' omission in 15 U.S.C. § 1635(f) of the recoupment and set-off language contained in 15 U.S.C. § 1640(e) clearly establishes the parameters for this court concerning the continued vitality of any rescission right which may have existed, after the expiration of three years.

(3) Statutory Damages

15 U.S.C. § 1640(a)(20(A) provides for the recovery of statutory damages even for a minor violation of TILA:

> (a) except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under $125, or Chapter 4 or 5 of this title, with respect to any person is liable to such person in an amount equal to the sum of —. . . .

> (20(A)(i) *in the case of an individual action twice the amount of any finance charge in connection with the transaction*, or (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, *except that the liability under this subparagraph shall not be less than $100.00 nor greater than $1,000.00;* (Emphasis added)

15 U.S.C. § 1640(e) provides for a one year statute of limitations for actions seeking civil damage for TILA violations but permits borrowers to affirmatively claim recoupment to offset the lender's debt collection action:

> Any action under this section may be brought in any United States district court, or in any court of competent jurisdiction, within one year from the date of the occurrence of the violation. *This subsection does not bar a person from asserting a violation of this title in an action to collect a debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by state law.* (Emphasis added).

Florida law permits a form of recovery by way of recoupment even though the statute of limitations has expired when the party pleads it defensively rather than as an independent cause of action. *See, Allie v. Ionata*, 503 So.2d 1237 (Fla. 1987). thus, any statutory damages recoverable by the BEACHES are not barred by the statute of limitations.

In this case, the finance charge for the loan transaction exceeded $176,000.00. Therefore the BEACHES are

entitled to the maximum amount of damages under the statute, $1,000.00 for GREAT WESTERN's TILA violations.

(4) For Actual Damages

15 U.S.C. § 1640(a)(1) provides as follows:

> ***Civil Liability***
> (a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under § 125, or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of –
>
> > (1) any actual damage sustained by such person as a result of the failure;

15 U.S.C. § 1640(e) provides for a one year statute of limitations for actions seeking civil damages for TILA violations but permits borrowers to affirmatively claim recoupment to offset the lender's debt collection action. Florida law permits affirmative recovery by way of recoupment even though the statute of limitations has expired when the party pleads it defensively rather than as an independent cause of action. *See Allie v. Ionata, surpa* [sic]. Thus, any actual damages recoverable by the BEACHES are not barred by the statute of limitations. Therefore, the BEACHES are entitled to actual damages for GREAT WESTERN's TILA violations.

Actual damages, although recoverable, are difficult to prove especially in class actions. *Adiel v. Chase Federal Savings and Loan Association*, 630 F.Supp. 131 (S.D. Fla. 1986). In *Adiel*, the federal district court explained the proof required the recover actual damages:

> To recover actual damages, each member of the class must prove that "he or she would have gotten credit on more favorable terms but for the violation." *McCoy v. Salem Mortgage Company*, 74 F.R.D. 8, 12 (E.D. Mich. 1976). Relying on *McCoy*, the court in *Vickers v. Home Federal Savings and Loan Association*, 62 A.2d 1171, 404 N.Y. S.2d 201, 202 (Sup. Ct. 1978) explained the showing necessary for a Plaintiff to recover actual damages under the Act:
>
> > A plaintiff claiming actual damages must establish a causal connection between the inaccurate disclosure and his injury by demonstrating he relied on the inaccurate disclosure and thereby was effectively prevented from obtaining better credit terms elsewhere.
>
> This "but for" operates to effectuate the very purpose of the Truth-in-Lending Act . . .

Id. at 133.

In *Adiel* the Plaintiff sought actual damages of the dollar amount of the loan points. The Southern District of Florida refused to award the plaintiffs actual damages, holding that the plaintiffs did not show "that they could have obtained credit on more favorable terms but for the alleged violation of the Act." *Id.*

The Bankruptcy Court for the Eastern District of Pennsylvania in *In Re: Russell*, 72 B.R. 855 (Bankr. E.D. Pa. 1987) disagreed with the test for factual damages promulgated in *Adiel*:

We acknowledge that some cases have given the statutory provision (15 U.S.C. § 1640(a)(1) a narrow reading). In *Adiel v. Chase Federal Savings and Loan*, 630 F.Supp. 131 (S.D. Fla.1986); and *McCoy v. Salem Mortgage Company*, 74 F.R.D. 8 (E.D. Mich. 1976), the courts held that a consumer must prove "detrimental reliance," i.e. that he or she would have gotten credit on more favorable terms but for the violation, to be entitled to a recovery based on 15 U.S.C. § 1640(a)(1).

There are several reasons why we believe that such a narrow reading of § 1640(a)(1) is in error. First, the entire TILA statute is remedial, disclosure legislation. In analogous federal Securities Exchange Act and Anti-Trust Act disclosure violation cases, the Supreme Court has repeatedly held that actual damages arise upon the Plaintiff's proof that a material disclosure misstatement has been made, irrespective of whether this misstatement actually resulted in conduct in reliance of it. (Citations omitted).

Secondly, a 1980 amendment to the TILA clarified in 15 U.S.C. § 1640(b) as follows, suggests the result that the consumer should be awarded, as actual damages, a reduction of undisclosed finance charges . . .

Finally, there is language in several TILA class actions which suggest that it is unrealistic and unnecessary for consumers alleging actual damages per 15 U.S.C. § 1640(a)(1) to prove "detrimental reliance." . . .

In the instant factual setting, it is apparent that the Defendant failed to include either the $1,190.00 "origination fee" or the $300.00 commission paid to Suburban Financial Services in

the finance charge set forth in the Debtor's TILA statement. It is difficult to image a more blatant and fundamental violation of the TILA, or one more far removed from the technical and practically innocuous TILA violations that this court has determined entitle the consumer to only statutory damages . . .

. . . .

We therefore hold that, having totally failed to disclose $1,490.00 of what were clearly "finance charges" as such on the Debtor's TILA statement, the Defendant is liable to the Debtor for actual damages of $1,490.00 per 15 U.S.C. § 1640(a)(1), in addition to $1,000.00 statutory damages pursuant to 15 U.S.C. § 1640(a)(1)(A)(i).

Id. at 863-864.

Although these cases seem somewhat irreconcilable, the BEACHES have satisfied the *Adiel* test and shown that they could have obtained credit on more favorable times [sic] but for the alleged violation of the act. If GREAT WESTERN had not overstated the annual percentage rate, the finance charge, the total of payments, and the amount of each of the last 348 payments, they would have received credit on more favorable terms from GREAT WESTERN itself. Therefore, the BEACHES should be awarded actual damages in the amount of the overstated finance charge, $201.84, plus the amount of the intangible tax which was mischaracterized as part of the amount financed, $194.16 for a total of $396.00.

CONCLUSION

GREAT WESTERN committed a number of TILA violations in this loan transaction, including misdisclosure of the annual percentage rate, the finance charge, the total of payments and the amount of each of the last 348 payments. The BEACHES are entitled to statutory damages in the amount of $1,000.00 and actual damages in the amount of $396.00, for a total damage award of $1,396.00. Therefore, this court shall off-set the amount owed to GREAT WESTERN under the Note by $1,396.00. However, the court will not rescind this transaction because it was a residential mortgage transaction exempt from rescission and the BEACHES failed to seek rescission within the three year time period in which the right to rescind would have existed had this transaction not been exempt.

JUDGMENT

By virtue of the foregoing, it is

ORDERED AND ADJUDGED:

1. Plaintiff, GREAT WESTERN BANK, is due from the Defendants, DAVID R. BEACH and LINDA M. BEACH, $94,678.68 as principal, $19,513.90 as interest, $897.16 as late charges, $5,756.35 for property taxes, less the BEACHES' damages of $1,396.00 making a total of $119,450.09, that shall bear interest at the rate of 12% per year. Attorney's fees and costs shall be added to the total sum due upon a further hearing by this court.

2. GREAT WESTERN holds a lien for the total sum superior to any claim or estate of the Defendants to this

cause, on the following described real property located in Palm Beach County, Florida:

> LOT 31, SET-N-SUN, ACCORDING TO THE PLAT THEREOF ON FILE IN THE OFFICE OF THE CLERK OF THE CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA, AS RECORDED IN PLAT BOOK 37, PAGES 143 AND 144.

3. The subject property shall not be sold and Plaintiff shall otherwise not execute on this judgment absent further order of this court.

4. Jurisdiction of this action is retained to enter further orders that are proper, including without limitation, an award of attorney's fees and costs to the Plaintiff, attorney's fees and costs to the Defendants, writs of possession and, if applicable, a deficiency judgment.

DONE AND ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida, this 23 day of March, 1994.

CIRCUIT COURT JUDGE
THOMAS E. SHOLTS

Copies furnished:

STEVEN ELLISON, ESQ., Broad and Cassel, 400 Australian Avenue South, Suite 500, West Palm Beach, FL 33401

JAMES A. BONFIGLIO, ESQ., P.O. Box 1489, Boynton Beach, FL 33425

JOSEPH K. STILL, JR., P.A., 1551 Forum Place, Suite 500E, West Palm Beach, FL 33401.

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and LINDA M. BEACH, his wife,

Defendants.

MOTION FOR REHEARING

Plaintiff, GREAT WESTERN BANK (hereinafter "GREAT WESTERN"), moves this Court for rehearing, pursuant to Rule 1.530 of the Florida Rules of Civil Procedure, and states:

1. On March 23, 1994 this Court entered a Final Judgment of Foreclosure in favor of the Plaintiff, GREAT WESTERN BANK.

2. In the Final Judgment, the Court determined that GREAT WESTERN had violated the Truth-In-Lending Act in several ways.

3. One violation found by the Court concerned GREAT WESTERN's overstatement of the finance charge by $201.84.

4. The second violation, relating to GREAT WESTERN'S inclusion of the intangible tax in the amount financed, resulted in the Court's finding that GREAT WESTERN had understated the finance charge by $194.16.

5. If the Court maintains its determination that the intangible tax was improperly treated as part of the amount financed, then the Court's finding that the finance charge was overstated outside of the tolerable limits of 12 C.F.R. §226.18(d), fn. 41 is incorrect.

6. Taken together, the two violations determined by the Court result in an overstatement of the finance charge by a total of $7.68.

7. Since that sum is within the tolerance level provided by 12 C.F.R. §226.18(d), fn. 41, no actual damages should have been awarded.

8. The argument above presumes the Court maintains its finding that the intangible tax was improperly treated as part of the amount financed.

9. Similar to mortgage recording fees and documentary stamp taxes on a mortgage, the intangible tax is a charge imposed as an incident to or a condition of the extension of credit.

10. Therefore, it can only be excluded from the finance charge under the exception contained in 12 C.F.R. §226.4(e)(1).

11. Payment of the intangible tax is required to perfect a security interest as no mortgage is enforceable in any Florida court nor can any written evidence of such mortgage be recorded in any public record of the state

until the non-recurring intangible tax has been paid. Fla. Stat. §199.282(5).

12. As the Court noted, paragraph 4(e)(1) of the Official Staff Commentary to 12 C.F.R. §226.4(e) provides, as an example, that stamps evidencing payment of taxes on property, if the stamps are required to file a security agreement on the property, are excludable from the finance charge in accordance with §226.4(e)(1). That example was not meant to exclude other taxes which must be paid to perfect the security interest.

13. There is no rational basis for distinguishing between documentary stamps and the intangible tax. Both must be paid to perfect a mortgage although both are designed for revenue enhancement.

14. Although the Eleventh Circuit Court of Appeals, in *Rodash v. AIB Mortgage Company*, 1994 WL 62760 (11th Cir. (Fla.)), determined that it was improper to exclude the intangible tax from the finance charge, that Court's ruling was unduly restrictive as it limited the charges excludable under 12 C.F.R. §226.4(e)(1) to those whose purpose is to perfect security interests.

15. The time for rehearing in *Rodash* has not passed and motions will be filed on the intangible tax issue.

16. The *Rodash* Court, and this Court, do not address the fact that §226.4(e)(1) specifically excludes "taxes" paid for perfecting security interests.

17. The concept of a tax is purely revenue enhancement and would, by definition, never be a perfecting "fee".

18. Since it was essential for the bank to pay the intangible tax in order to perfect its security interest, the tax should be excludable from the finance charge.

WHEREFORE, GREAT WESTERN BANK moves this Court for rehearing, and asks that an Amended Final Judgment be entered in accordance with the argument set forth herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 4th day of April, 1994, to DANIEL L. BAKST, ESQUIRE, Post Office Drawer 3948, West Palm Beach, Fl 33402-3948, JAMES A. BONFIGLIO, P.A., 189 Bradley Place, Palm Beach, FL 33480, and JOSEPH K. STILL, JR., P.A., 1551 Forum Place, Suite 500E, West Palm Beach, FL 33401.

BROAD AND CASSEL
Attorneys for Creditor
The Reflections Office Centre
Suite 500
400 Australian Avenue South
West Palm Beach, Florida 33401
(407) 832-3300

By: /s/ Steven Ellison
Steven Ellison
Florida Bar No. 510319

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. CL 92 6071 AG

GREAT WESTERN BANK, formerly
GREAT WESTERN SAVINGS,

Plaintiff(s),

vs.

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Defendant(s).

_____/

ORDER DENYING MOTION FOR REHEARING

This cause was tried non jury and is before the court on Plaintiff's Motion for Rehearing (Docket Entry #61). Upon consideration, the motion is denied.

ORDERED at West Palm Beach, Florida,

APR 14 1994

/s/ Thomas E. Sholts
Thomas E. Sholts, Circuit Judge

Copy furnished:
James A. Bonfiglio, P. A., 189 Bradley Place, Palm Beach, Fl 33480
Joseph K. Still, Jr., P. A., 1551 Forum Place, Suite 500 E, West Palm Beach, Florida 33401
Daniel L. Bakst, Esquire, P. 0. Drawer 3948, West Palm Beach, Fl 33402-3948
Steven Ellison, Esquire, The Reflections Office Centre, Suite 500, 400 Australian Avenue South, West Palm Beach, Fl 33401

Plaintiffs Exhibit List

DATE	NO.	IDENTIFICATION	DATE	NO.	IN
10/28/93	1	Promissory Note dated 1986	10/20/93	1	W
|	2	Mortgage Deed " "	|	2	|
|	3	Federal Truth-in-lending Disclosure	|	3	|
|	4	Itemization of Amount Financed	|	4	|
|	5	Notice of Right to Cancel	|	5	|
|	6	Special VRM Notice Executed by Deft	|	6	|
|	7	Loan Disclosure Variable Rate II	|	7	|
|	8	Loan Commitment dated 7/28/86	|	8	|
|	9	Procedures Bulletin dated 10/1/82	|	9	|
|	10	" " 9/27/82	|	10	|
|	11	G.W. Procedures Bulletin dated 5/27/85	|	11	|
|	12	Loan Quote/ Approval for the Defts	|	12	|
|	13	laboring statement	|	13	|

|	14	Good Faith Estimate of Itemization	|	14	|
|	15	Blank Form Notice of Right to Cancel (GW)	|	15	|
|	16	" " (Illegible)	|	16	|
|	17	Certified Copy of Beneficial Illegible	|	17	|
↓	18	" " Great Western Savings	↓	18	↓

LEY, & MARSAA
COURT REPORTERS

PAMELA BEAUVAIS

1551 Forum Place
Phone (407) 686-0400 Suite 500-B
Fax (407) 686-0655 W. Palm Beach,
Fl. 33401

COMMENTS/PARTY NAMES: GREAT WESTERN BANK VS DAVID R. BEACH, ET UX.

Case No. CL92-6071-AG

Defendants Exhibit List

DATE	NO.	IDENTIFICATION	DATE	NO.	IN EV
10/20/93	1	WARRANTY DEED	10/20/93	1	W/O
|	2	FIDELITY FEDERAL MTGE LOAN LETTER	|	2	|
|	3	FIDELITY FEDERAL MTGE	|	3	|
|	4	FIDELITY FEDERAL NOTE	|	4	|
|	5	FIDELITY FEDERAL DISCLOSURE STATEMT	|	5	|
|	6	Certificate of Occupancy	|	6	|
|	7	Great Western Application	|	7	|
|	8	Great Western Counter Proposal	|	8	|
|	9	Fidelity Federal Estoppel Letter	|	9	|
↓	10	Bulletin Composite	↓	10	↓

COMMENTS/PARTY NAMES: GREAT WESTERN BANK VS DAVID R. BEACH, ET UX

Case No. CL92-6071-AG

PLAINTIFF'S EXHIBIT #1

NOTICE TO BORROWER: THIS NOTE CONTAINS PROVISIONS FOR AN ADJUSTABLE INTEREST RATE AND A BALLOON PAYMENT MAY BE DUE AT MATURITY

PROMISSORY NOTE

VRM II

LOAN NO.: 0-474423-3
DATE: AUGUST 15, 1986
WEST PALM BEACH, Florida

The undersigned (and if more than one, each of them jointly and severally) promises to pay GREAT WESTERN SAVINGS, a Federal Savings and Loan Association or order ("Association"), at Association's office at 9451 Corbin Avenue, Northridge, California 91328, or at such other address Association designates, the principal sum of $97,300.00 with interest from date of disbursement of funds on unpaid principal at the initial adjustable interest rate of 8.750% per year ("Initial Rate"), payable in monthly installments of $765.46 initially, commencing on 10 01 1986 and continuing on the 1ST day of each and every month thereafter until paid or until 09 01 2016 ("Maturity Date"), when all sums then remaining unpaid shall immediately become due and payable. Each installment shall be credited first to interest which became due during the month for which payment is being made, then to any unpaid interest which became due previously, and the remainder to principal; interest shall then cease on the portion of principal credited. Monthly interest will be

computed at 1/12th of the annual rate and any partial month's interest at 1/30th of the monthly calculation per day. To the extent that any scheduled monthly installment due is insufficient to pay the monthly interest required by the terms of this Note, the amount of such unpaid interest ("Deferred Interest") shall as of the due date of any such monthly installment, be added to and become a part of the unpaid principal and shall bear interest thereafter as provided in this Note.

In the event any sum has not been paid at the Maturity Date, interest shall be due from the Maturity Date on such unpaid sums, without extending the Maturity Date or waiving such default, at the rate applicable to the final monthly installment.

1. DEFINITIONS. As used in this Note: (a) "T-Bill Auction Rate" means the weekly average auction rate for United States Treasury Bills with a maturity of 26 weeks sold at a discount by the U.S. Treasury Department at its weekly auctions ("Auction."). If the Auctions are discontinued or changed in any material way, the Association may select a comparable alternate comparison rate to permit interest rate adjustments, (b) "Rate Differential" shall mean 2.750 percentage points (c) "Fixed Payment Interval" means each successive increment of 12 monthly installments due under the terms of this Note, provided, however, the final such increment may include fewer than 12 installments.

2. ADJUSTABLE INTEREST RATE TERMS. The adjusted interest rate shall be effective as of the due date of the 6th monthly installment of this Note and subsequent changes shall be effective as of the due date of each

6th monthly installment thereafter ("Rate Adjustment Dates") as follows: (a) An Average of each of the weekly T-Bill Auction Rates will be computed for those Auctions held in that Calendar month immediately preceding the calendar month in which the Rate Adjustment Date falls; (b) The Rate Differential shall be added to the **monthly average rate** as determined above; and the resulting sum shall be the interest rate of this Note until the next Rate Adjustment Date, except as limited by the terms of the following Paragraph. No prior notification of interest rate adjustments shall be required.

3. LIMITATIONS ON INTEREST RATE ADJUSTMENTS. Notwithstanding any other provision of this Note, the interest rate may NOT: (a) be increased or decreased more than 0.50 percentage points above or below the interest rate in immediately prior to any Rate Adjustment Date; (b) be adjusted more than 5.00 percentage points above or below the Initial Rate during the loan term.

4. INSTALLMENT ADJUSTMENT. At the end of each Fixed Payment Interval, the monthly installments due during the next Fixed Payment interval shall be adjusted to an amount which would be sufficient to pay in full the then outstanding balance of the loan evidenced by this Note including any Deferred Interest which may have been added to the principal under the provisions of this Note (without regard to any delinquent or prepaid installments), at the most recently established interest rate, in equal monthly installments over the remainder of the originally scheduled term. Provided, however, that any monthly installment increase or decrease required under the provisions of this paragraph shall not exceed

7½% of the last monthly installment due during the previous Fixed Payment Interval **except** monthly payments due during that Fixed Payment Interval which follows each fifth Fixed Payment Interval will be adjustable without the 7½% limitation.

5. DEFAULT AND ACCELERATION. Upon failure to pay any installment when due or to perform when due any obligation, covenant, or agreement in this Note, in the Mortgage Deed or other security instruments which secure this Note, or in any other document executed by the undersigned to induce Association to make the loan evidenced by this Note, or if any statement made by the undersigned in any such document is false or misleading, then all indebtedness (including principal and interest) remaining unpaid shall become immediately due, at Association's sole option.

6. OBLIGORS. Each Obligor (which term shall mean and include each of the undersigned and any endorser, surety or guarantor of this Note) hereof severally waives presentment, demand, protest, extension of time without notice and notice of dishonor, maturity, nonpayment or protest and all requirements necessary to hold each of them liable hereunder. No delay or omission on the part of the Association in exercising any right hereunder shall operate as a waiver of such right or of any other right under this Note or any other instrument now or hereafter evidencing or securing this Note or the obligation represented hereby.

7. LATE CHARGES. The undersigned promises to pay a late charge equal to 5% of the monthly principal and interest of any installment which is not received

within 15 days after its due date. The undersigned acknowledges that it would be extremely difficult or impracticable to determine Association's actual damages resulting from any late payment and this late charge is a reasonable estimate of those damages. Association agrees to accept this late charge as its sole right to damages for any late payment. Acceptance of any late charge shall not limit any of Association's other rights under this Note, Mortgage Deed or other documents executed to induce Association to make the loan evidenced by this Note.

ALL TERMS AND CONDITIONS CONTINUED
ON THE REVERSE SIDE HEREOF
ARE INCLUDED IN THIS PROMISSORY NOTE.
(*PLEASE SIGN YOUR NAME EXACTLY*
AS IT APPEARS BELOW)

/s/ David R. Beach
DAVID R. BEACH

/s/ Linda M. Beach
LINDA M. BEACH

PLAINTIFF'S EXHIBIT #2

RECORDING REQUESTED BY
THIS MORTGAGE DEED WAS
PREPARED BY ALINA ALVAREZ
FOR GREAT WESTERN SAVINGS

SPACE ABOVE
THIS LINE FOR
RECORDER'S
USE

(LOGO)
GREAT WESTERN SAVINGS
A Federal Savings and
Loan Association

P.O. BOX 1900
NORTHRIDGE, CA 91328

Mortgage Deed
(ADJUSTABLE INTEREST RATE)

LOAN AMOUNT: $97,300.00 LOAN NO. 0-474423-3

THIS MORTGAGE DEED, made this 15TH day of AUGUST, 1986, between DAVID R. BEACH, JOINED BY HIS WIFE, LINDA M. BEACH, herein called "Mortgagor", whose address is 5870 SET-N-SUN PLACE,
(Number and Street)
JUPITER, FL 33458
(City) (State) (Zip Code)

and GREAT WESTERN SAVINGS, a Federal Savings and Loan Association, a United States corporation, herein called "Mortgagee", WITNESSETH: That Mortgagor irrevocably grants, transfers, and assigns to Mortgagee, that certain real property located in PALM BEACH County, Florida, described as:

LOT 31, SET-N-SUN, ACCORDING TO THE PLAT THEREOF ON FILE IN THE OFFICE OF THE CLERK OF THE CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA, AS IN PLAT BOOK 37, PAGES 143 AND 144.

97,300.00	Documentary Tax Pd $145.95
17.60	$194.60 Intangible Tax Pd.
145.95	Clerk, Palm Beach County,
194.60	Florida
	/s/ John B. Illegible

THE BALANCE OF THE INDEBTEDNESS, IF NOT SOONER PAID, IS DUE AND PAYABLE ON: SEPTEMBER 1, 2016

TOGETHER WITH all property rights or interest appurtenant thereto including, without limitation, all buildings, structures, improvements, appliances, equipment and appurtenances now or hereafter constructed or placed thereon, including, but not limited to, all apparatus and equipment, whether affixed to the land or building thereon or not affixed thereto, whether single units or centrally controlled, used to provide or supply air-cooling, air-conditioning, heat, gas, water, light and power, refrigeration, ventilation, laundry, clothes drying, dishwashing, garbage disposal or other services, waste vent systems, antennas, pool equipment, window coverings, drapes and drapery rods, carpeting and floor coverings, awnings, ranges and ovens, water heaters, attached cabinets, pumps, pipes, tanks, fire prevention, fire extinguishing and communications apparatus, elevators, escalators, and partitions, and all of the above items are declared to be and are deemed to be things affixed to and a part of the realty for the purposes of this Mortgage Deed.

TOGETHER WITH all interest which Mortgagor now has or may hereafter acquire in or to said property and in and to:

(a) All rents, issues, profits, royalties, tolls, earnings and incomes therefrom and installments of money

payable pursuant to any agreement for sale of said property or any part thereof, subject however to the right, power and authority given to and conferred upon Mortgagee by Paragraph 15 below, reserving to Mortgagor the right to collect when due and retain any of said sums prior to any event of default hereunder;

(b) All easements, rights of way and other appurtenances thereto;

(c) All shrubs, trees and plants;

(d) All adjacent lands included in enclosure or occupied by buildings located partly on the above described property;

(e) All crops growing or to be grown on said property;

(f) All water and water rights (whether or not appurtenant) and shares of stock pertaining to water or water rights, ownership of which affects said property;

(g) All claims, demands or causes of action of any kind, including proceeds of settlement of any such claim, demand or cause of action of any kind, which Mortgagor now has or may hereafter acquire, arising out of acquisition or ownership of the property, subject however to the right, power and authority given to and conferred upon Mortgagee by Paragraph 5 below Mortgagee shall have no duty to prosecute any such claim, demand or cause of action.

For the purposes of this instrument, including all provisions incorporated by reference herein, all of the foregoing described real property, property rights and interest shall be referred to as "the property".

THIS MORTGAGE DEED IS FOR THE PURPOSE OF SECURING THE FOLLOWING:

A. Payment of the loan amount above, with interest thereon, according to the terms of a Promissory Note or Notes (herein sometimes referred to as "the note") of even date herewith, made by Mortgagor, payable to Mortgagee or order, and any and all modifications and extensions or renewals thereof;

B. Payment of such additional sums, with interest thereon, as may be hereafter borrowed from Mortgagee by the then record owner or owners of the property which are hereby secured and all extensions, modifications and renewals of such additional borrowings;

C. Payment, performance and discharge of every obligation, covenant and agreement of Mortgagor whether contained or incorporated by reference in this Mortgage, or contained in any instrument now or hereafter executed by Mortgagor in connection with the loan evidenced by the note, including but not limited to any assignment, construction loan agreement, pledge agreement, security agreement, supplemental agreement, assignment of lessor's interest in leases, modification agreement or assumption agreement;

D. Payment of all sums of money with interest which may be paid out or advanced by, or may otherwise be due to Mortgagee under any provision of this Mortgage;

To Protect the Security of This Mortgage Deed, Mortgagor Agrees;

1. PRESERVATION OF THE PROPERTY. Mortgagor (a) shall keep the property in good condition and repair, (b) shall not remove, demolish or substantially alter any

building, structure or improvement thereon, (c) shall complete or restore promptly and in good workmanlike manner any building which may be constructed, damaged or destroyed thereon and will pay when due all claims for labor performed and material furnished therefore, (d) shall comply with the provisions of all insurance policies covering and with all laws and regulations affecting the property or requiring any alterations, repairs or improvements thereon, (e) shall not commit or suffer any waste thereon, (f) shall not commit or suffer any act upon the property in violation of any provision of any insurance policy or law or regulation, (g) shall paint, decorate, cultivate, irrigate, fertilize, fumigate and prune the property; and (h) consistent with the use thereof, do all other acts which the character or use of the property may reasonably require.

2. INSURANCE. Mortgagor shall, at Mortgagor's expense, provide and maintain in force at all times with respect to the property, fire and other types of insurance as may be required by Mortgagee. All of such insurance policies shall have a loss payable endorsement in favor of Mortgagee and shall be for a term and in form, content, amount, and with such insurance companies, as may be satisfactory to Mortgagee. Such policies shall be delivered to Mortgagee upon the making of this Mortgage upon the request of the Mortgagee. Mortgagor shall also deliver at such times evidence that the full premium for any such policy has been paid. Mortgagee at its option may retain possession of the original policy or may release it to the possession of the Mortgagor. If the Mortgagee retains possession of such policies, at least thirty (30) days before the expiration of any such insurance policy, a policy or

policies renewing, extending or replacing such expiring insurance shall be delivered by Mortgagor to Mortgagee. If any such insurance policy is not so delivered to Mortgagee or in the event any such insurance policy is canceled, whether the Mortgagee has in its possession the policies or not, and no reinstatement or replacement policy is received prior to termination of insurance Mortgagee, without notice to or demand upon Mortgagor, may (but shall not be obligated to) obtain such insurance with such company as Mortgagee may deem satisfactory, and pay the premium therefore, and the amount of any premium so paid shall be charged to and promptly paid by Mortgagor or at the option of Mortgagee, may be added to the indebtedness secured hereby.

In the event Mortgagee obtains any such insurance policy, Mortgagor, for his own benefit and for the protection of this equity interest in the property, hereby requests and authorizes Mortgagee, but without liability on the part of Mortgagee for failure so to do, to obtain such policy for such term and in such form, content and amount and with such insurance companies as may be satisfactory to Mortgagee. Should any policy thus obtained by Mortgagee there after be canceled, Mortgagor shall pay to Mortgagee any earned premiums on said policy and a reasonable charge for its services in obtaining such policy.

Mortgagee shall be responsible for the collection of any insurance monies, or for any insolvency of any insurer or insurance underwriter. Any part or all of the amount collected under any fire or other insurance policy may be applied by Mortgagee upon any indebtedness secured by this Mortgage at such time and in the manner

and amount as Mortgagee may determine, or at the option of Mortgagee, without reducing the Indebtedness secured hereby, may either be used to replace, restore or reconstruct the property to a condition satisfactory to Mortgagee or be released to Mortgagor. Any application, use or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice. Mortgagor shall pay Mortgagee inspection fees and other costs resulting from or connected with the casualty loss to which such insurance relates.

3. LIFE, ACCIDENT OR HEALTH INSURANCE. If Mortgagor shall assign or deliver a policy of life, accident or health insurance to Mortgagee as further security hereunder, then if Mortgagor fails to pay any premium thereon, Mortgagee shall be entitled, but not obligated, to pay any such premium. Any amount so paid shall be charged to and promptly paid by Mortgagor or, at the option of Mortgagee, may be added to the indebtedness secured hereby.

4. TAXES AND ENCUMBRANCES. Mortgagor shall pay (a) at least twenty (20) days before delinquency, all general and special taxes and assessments now or hereafter affecting the property, including any assessments on appurtenant water stock; (b) when due, all special assessments for public improvements without permitting any improvement bond to issue for any special assessment; (c) on demand of Mortgagee, all encumbrances, charges and liens on the property or any party thereof, which are or may be prior or superior hereto; (d) when due, all fees and charges incidental to ownership, occupancy or beneficial use of the property; and (e) if the property includes

a condominium, community apartment or part of a planned development, all payments required of the owner thereof under any declaration of covenants or conditions or restrictions pertaining to such project. Should Mortgagor fail to make any payment under this Paragraph 4, Mortgagee may, but shall not be obligated to, make such payment and any amount so paid shall be charged to and promptly paid by Mortgagor or, at the option of Mortgagee, shall be added to the indebtedness secured hereby, without regard to the validity or legality of such assessments, liens or charges.

5. CLAIMS, DEMANDS AND ACTIONS. Mortgagor shall (a) appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Mortgagee; (b) at the option of Mortgagee, assign to Mortgagee, to the extent of Mortgagee's interest, any claims, demands or courses of action of any kind, including any award, court judgment or proceeds of settlement of any such claim, demand or cause of action of any kind which Mortgagor now has or may hereafter acquire arising out of acquisition or ownership of the property. Without limiting the generality of the foregoing any such claim, demand or cause of action arising out of acquisition or ownership of the property may include (i) any such injury or damage to the property or any structure or improvement situated thereon, or (ii) any claim or cause of action in favor of Mortgagor which shall have arisen out of the transaction financed in whole or in part by the making of the loan secured hereby or (iii) any claim or cause of action in favor of Mortgagor (except for bodily injury) which arises as a result of any negligent or

improper construction, installation or repair of the property, including the surface or subsurface thereof, or of any building or structure thereon. Mortgagee may apply, use or release such monies so received by it in the same manner as in Paragraph 2 provided for the proceeds of fire or other insurance.

6. DEFENDING MORTGAGE. Notwithstanding the provisions of Paragraph 5, Mortgagee may (a) commence and prosecute or appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Mortgagee; (b) pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of Mortgagee appear to be prior or superior hereto; and (c) in exercising any such right, incur any liability and expend whatever amounts Mortgagee deems reasonably necessary, including cost of evidence of title and reasonable attorneys' fees.

7. PROTECTION OF SECURITY BY MORTGAGE. Should Mortgagor fail to make any payment or do any act provided in this Mortgage, then Mortgagee, but without obligation so to do, and without notice to or demand upon Mortgagor, and without releasing Mortgagor from any obligation hereof, may make any such payment or do any such act in such manner and to such extent as it deems necessary to protect the security hereof. Mortgagee is authorized to enter upon the property at any time for such purpose.

8. REIMBURSEMENT. Mortgagor shall pay immediately upon demand all costs, fees or expenses incurred and sums expended or advanced under the terms of this Mortgage by Mortgagee, with interest thereon at a rate

equal to the rate provided for in the note secured hereby, and the obligation of Mortgagor to pay such sums and interest as aforesaid shall be secured hereby. If Mortgagee shall make such payment or expend such sums, Mortgagor shall pay a service charge in an amount equal to ten per cent (10%) of the payment made or the sum expended.

9. LEASEHOLD ESTATES. If the security for this Mortgage is a leasehold estate, Mortgagor shall not modify or terminate the lease or leases creating the leasehold estate, and shall comply with all of the covenants and conditions required of the Lessee or his successor in interest to be performed under the lease or leases creating said leasehold estate, including but not limited to paying when due rent and other charges imposed upon such Lessee.

10. ESCROW (IMPOUND) ACCOUNT. Mortgagor shall pay to Mortgagee, if Mortgagee shall so demand, in addition to any other payment required hereunder, monthly installments for the purpose of creating and maintaining a fund to provide payment when due of any taxes, encumbrances, assessments, leasehold payments relating to the property, premiums for any policies of insurance insuring the property, the Mortgagor or the loan, more specifically referred to in Paragraphs 2, 3, 4 and 9. Mortgagor shall deliver promptly to Mortgagee all bills and notices thereof. Said installments shall be in such amounts as Mortgagee shall estimate from time to time to be necessary to provide sufficient monies in said fund to pay such taxes, encumbrances, assessments, leasehold payments and premiums when they become

due and shall be payable concurrently with the installment under the note. If the amounts paid to Mortgagee under the provisions of this paragraph are insufficient to pay such taxes, assessments, leasehold payments and premiums as they become due. Mortgagor shall pay to Mortgagee promptly upon demand the amount of the deficiency.

In the event of default of any obligation hereby secured, then any funds in the possession of Mortgagee under the provisions of this paragraph may, at the option of Mortgagee, be applied upon any indebtedness secured hereby.

11. FINANCIAL STATEMENTS. Within thirty (30) days after written demand by Mortgagee (but not more frequently than semi-annually), Mortgagor shall deliver to Mortgagee verified financial statements, prepared in accordance with acceptable accounting practices, for such annual or other period as Mortgagee may designate. Such financial statements shall include balance sheets, operating statements, and statements of sources and application of funds. In addition, Mortgagor shall deliver to Mortgagee on demand, copies of all leases, agreements, vouchers, receipts and other documents supporting any of the items shown in such statements. Mortgagor shall keep and maintain a full and accurate set of books and records showing all the matters above specified, and shall permit Mortgagee at any time to inspect and audit all Mortgagor's books of account, records, and papers relating to any of the foregoing matters. In the event any such audit is caused to be made by Mortgagee by reason of the failure of Mortgagor to comply with any of the foregoing provisions, then Mortgagor shall pay to Mortgagee upon

demand all expenses incurred by Mortgagee in connection with such audit.

None of the provisions of this Paragraph 11 shall be applicable so long as the property is residential in nature and designed for occupancy by less than five (5) families.

12. DAMAGE TO OR CONDEMNATION OF PROPERTY. Any award of damages or compensation for injury to, or in connection with any condemnation for public use of the property or any part thereof, or any proceeds of any settlement with respect to a condemnation whether or not eminent domain proceedings have been instituted, shall be and is hereby assigned by Mortgagor and shall be paid to Mortgagee, who may apply, use or release the amount thereof in the same manner as in Paragraph 2 provided for the proceeds of fire or other insurance.

13. BENEFICIARY'S CONSENT REQUIRED. Mortgagee may declare all sums secured hereby immediately due and payable within 30 days after such declaration except as expressly limited by law, if Mortgagor, without Mortgagee's prior written consent: (a) sells, conveys, contracts to sell, alienates or further encumbers all or any part of the property, or (b) leases all or any part of the property for a term, together with all exercisable options, of 5 years or more; or (c) suffers the title or any interest in the secured property to be divested, whether voluntarily or involuntarily; or (d) changes or permits to be changed the character or use of the property; or (e) is a partnership and any of the general partners' interests are transferred or assigned, whether voluntarily or involuntarily; or (f) is a corporation with fewer than 100 stockholders at the date of execution of this Mortgage and more than 10%

of its capital stock is sold, transferred or assigned during a 12-month period.

14. NO WAIVER. Mortgagee by accepting payment of any sum secured hereby after its due date, or by making payment or taking any action which, under the provisions hereof Mortgagee is entitled but not obligated to make or take, or by forbearing from enforcing any of its rights, shall not be deemed to have waived its right to require payment from or action by Mortgagor and to declare a default for Mortgagor's failure to do so.

In the event Mortgagee should expressly waive any rights under any provisions of this Mortgage, such waiver shall not be deemed a waiver of any rights Mortgagee may have subsequently to require payment from or action by Mortgagor and to declare a default for Mortgagor's failure to do so.

15. ASSIGNMENT. Mortgagor hereby assigns and transfers to Mortgagee during the continuance of this Mortgage, all rents, issues, profits, royalties, tolls, earnings and income of the property including those arising by reason of any oil, gas or mineral lease thereof, and all installments of money payable pursuant to any contract of sale or lease relating to the property or any part thereof (hereinafter referred to collectively as "income"), together with the right, power and authority to collect and retain all such income as it becomes due and payable. All income received by Mortgagee through the exercise of the foregoing assignment, less all expenses, (including reasonable attorneys' fees) incurred by Mortgagee in collecting such income shall be applied by Mortgagee on any indebtedness secured by this Mortgage at such time and

in the manner and amount as Mortgagee may determine. Without limiting the generality of the foregoing, such application may include payment of periodic installments of principal and interest, or reduction of the principal balance or reimbursement to Mortgagee as provided in Paragraph 8. The foregoing assignment is intended as an assignment to take effect only upon a default by Mortgagor in any of Mortgagor's obligations under this Mortgage, and Mortgagor accordingly reserves the right, prior to any such default, to collect and retain all such income as it becomes due and payable.

16. DEFAULT BY MORTGAGOR. Upon default by Mortgagor in payment of any indebtedness secured, or in the performance of any obligation imposed upon Mortgagor, by this Mortgage, Mortgagee may, without notice and without regard to the adequacy of the security for the indebtedness secured hereby, either personally or by attorney or agent, without bringing any action or proceeding, without entering into possession of the property, or by receiver to be appointed by a court, (a) enter into possession and hold, occupy, possess and enjoy the property; (b) make, cancel, enforce, modify or terminate leases; (c) obtain and eject tenants; (d) set or modify rents; (e) take, receive and collect all or any part of the rents, issues, profits, royalties, tolls, earnings, income and installments (hereinafter referred to collectively as "income") as it becomes due and payable. After paying such costs of maintenance and operation of the property as it in its judgment may deem proper, Mortgagee may apply the balance upon the entire indebtedness then secured hereby. The acceptance of such income shall not constitute a waiver of any other right which Mortgagee

may have under this Mortgage or under the laws of Florida. The receipt and application by Mortgagee of such income pursuant hereto, shall not cure any breach or default, nor affect any proceeding instituted by reason thereof, but such income, less all costs of operation and maintenance, when received by Mortgagee, shall be applied in reduction of the entire indebtedness from time to time secured hereby. Mortgagor shall not in any manner obstruct or interfere with any of Mortgagee's rights under this Paragraph 16. In the event Mortgagee acts under the provisions of this Paragraph 16, Mortgagor shall pay a service charge in an amount equal to five percent (5%) of all income collected by Mortgagee.

17. Upon request of Mortgagor, Mortgagee may, at its sole option, from time to time make future advances to Mortgagor; provided, however, that such advances are made within twenty (20) years from the date hereof and that the total principal secured hereby and remaining unpaid, including any such advances, shall not at any time exceed the aggregate outstanding principal sum of $0.00 plus any disbursements made by Mortgagee for the payment of taxes, levies, or insurance on the Mortgaged Property, with interest on such disbursements at the default rate provided in promissory note secured hereby. Mortgagor shall execute and deliver to Mortgagee a note evidencing each and every such future advance which Mortgagee may make, and such documents as Mortgagee may require to reflect that such note is secured hereby. Mortgagor shall pay all such future advances with interest provided therefor, and the same, and each note evidencing the same, shall be secured hereby. Nothing herein contained shall obligate Mortgagee to make any

such future advances. The word "Mortgagor" as used in this paragraph, includes any successor in ownership of the Mortgaged Property or any part thereof. The word "Mortgagee" as used in this paragraph includes any assignee of Mortgagee.

18. FEES. Mortgagor shall pay to Mortgagee the maximum amount as may from time to time be permitted by law for furnishing in connection with the obligations secured hereby, each statement pursuant to any statute at the time when in force. Additionally, Mortgagor shall pay Mortgagee's fees, charges and expenses for any other statement, information or services furnished by Mortgagee in connection with the obligations secured hereby. Said services may include, but shall not be limited to, the processing by Mortgagee, of assumptions, substitutions, modifications, extensions, renewals, subordinations, rescissions, changes of owner, the processing of, or joinder in the execution of, any map, plat survey or other instrument affecting or describing the property (including all recording costs), recordation of map, plat or record of survey, grants of easements, and full and partial releases, and the obtaining by Mortgagee of any policies of insurance pursuant to any of the provisions contained in this Mortgage.

19. WAIVER OF STATUTE OF LIMITATIONS. Mortgagor hereby waives, to the fullest extent permissible by law, the statute of limitations as a defense to any demand or obligation secured by this Mortgage.

20. GENERAL PROVISIONS

A. The term "Mortgagor" shall mean all parties executing this Mortgage as Mortgagor, their respective heirs, legatees, devisees, administrators, executors, successors in interest and assigns, provided that Mortgagee shall not be obligated to give any notice required hereunder to any Mortgagor other than as shown on the face page hereof.

B. The term "Mortgagee" shall mean the owner and holder (including a pledgee) of the note secured hereby, whether or not named as Mortgagee herein.

C. Every provision of the Mortgage imposing upon Mortgagor an obligation to perform an act, or embodying an agreement by Mortgagor to perform an act, shall be construed as obligating Mortgagor to pay all costs and expenses relating thereto.

D. In the event any provision hereof shall be declared invalid or unenforceable through a final judgment in a court having competent jurisdiction, the validity or enforceability of any of the remaining terms hereof shall not be thereby impaired.

E. In this Mortgage, wherever the context so requires, the masculine gender includes the feminine and neuter, the singular number includes the plural, and vice versa, and if more than one person is named as Mortgagor, the obligations of Mortgagor shall be the joint and several obligations of each person.

F. The term "attorneys fees" shall include all costs, expenses and attorneys fees incurred prior to the institution of any proceeding, during the pendency thereof, and at all levels of appeal.

G. Captions and paragraph headings used herein are for convenience only and are not a part of this agreement and shall not be used in construing it.

21. ADJUSTABLE MORTGAGE LOAN (VARIABLE RATE). The note secured by this Mortgage Deed contains provisions which may result in increases in the interest rate, in the monthly installments, and in the unpaid principal balance. Reference is hereby made to the Promissory Note for the specific provisions relating to such increases.

The undersigned Mortgagor(s) request(s) that a copy of any notice required hereunder be mailed to each Mortgagor named on the face page hereof, at the address set forth thereon.

NOTICE TO BORROWER: THIS DOCUMENT CONTAINS PROVISIONS FOR AN ADJUSTABLE INTEREST RATE AND CONTAINS PROVISIONS WHICH MAY REQUIRE A BALLOON PAYMENT AT MATURITY.

Signature of Mortgagor

/s/ Luisa R. Bosso
Witness

/s/ Illegible Lahnson
Witness

/s/ W. J. Bosso, Jr.
Witness

/s/ Victoria Nagel
Witness

/s/ David R. Beach
DAVID R. BEACH
Borrower

Borrower

/s/ Linda M. Beach
LINDA M. BEACH
Borrower

Borrower

STATE OF FLORIDA,
COUNTY OF PALM BEACH SS.

The foregoing instrument was acknowledged before me this 15 day of Aug., 1986, by DAVID R. BEACH JOINED BY HIS WIFE LINDA M. BEACH

/s/ Luisa R. Bosso
Notary Public, State of Florida
Notary Public
State of Florida at Large
My Commission Expires
July 11, 1990

(Notarial Seal)

Mortgage Deed

(LOGO)
GREAT
WESTERN
SAVINGS
A Federal Savings
and Loan Association

PART II MORTGAGE DEED

REFERENCING PART I ATTACHED
DATED: AUGUST 15, 1986
LOAN #: 0-474423-3
LOAN AMOUNT: $ 97,300.00

Record Verified
Palm Beach County, Fla.
John B. Dunkle

PLAINTIFF'S EXHIBIT #5

EXHIBIT "G"

(LOGO)
GREAT WESTERN SAVINGS
1675 PALM BCH. LAKES BLVD. #210,
WEST PALM BEACH, FLA 33401

(GW REFINANCE)

NOTICE OF RIGHT TO CANCEL

RE: 0-474423-3 Security property located at:
5870 SET-N-SUN PLACE
JUPITER, FLORIDA 33458

Your Right To Cancel

You are entering into a new transaction to increase the amount of credit provided to you. We acquired a (mortgage/lien/security interest) (on/in) your home under the original transaction and will retain that (mortgage/lien/security interest) in the new transaction. You have a legal right under federal law to cancel the new transaction, without cost, within three business days from whichever of the following events occurs last:

(1) the date of the new transaction, which is 8/15/86; or

(2) the date you received your new Truth in Lending disclosures _____; or

(3) the date you received this notice of your right to cancel _____.

If you cancel the new transaction, your cancellation will apply only to the increase in the amount of credit. It will not affect the amount that you presently owe or the

(mortgage/lien/security interest) we already have (on/in) your home. If you cancel, the (mortgage/lien/security interest) as it applies to the increased amount is also cancelled. Within 20 calendar days after we receive your notice of cancellation of the new transaction, we must take the steps necessary to reflect the fact that our (mortgage/lien/security interest) (on/in) your home no longer applies to the increase of credit. We must also return any money you have given to us or anyone else in connection with the new transaction.

You may keep any money we have given to you in the new transaction until we have done the things mentioned above, but you must then offer to return the money at the address below. If we do not take possession of the money within 20 calendar days of your offer, you may keep it without further obligation.

How To Cancel

If you decide to cancel the new transaction, you may do so by notifying us in writing at

1675 PALM BCH. LAKES BLVD. #210,
WEST PALM BEACH, FLA 33401

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of 8/19/86 (or midnight of the third business day following the latest of the three

events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

_____ _____

Consumer's Signature Date

ACKNOWLEDGEMENT OF RECEIPT OF
2 COPIES OF NOTICE

The undersigned hereby acknowledges receipt of 2 completed copies of the Notice above.

/s/ David R. Beach /s/ Linda M. Beach
DAVID R. BEACH LINDA M. BEACH
Consumer Signature

8-15-86
Date

VERIFICATION OF ELECTION NOT TO CANCEL

The time having elapsed for cancelling the loan transaction as stated in the above Notice of Right to Cancel, each of the undersigned hereby represents that he/she has not cancelled or rescinded the above loan transaction and requests the above named association to proceed in connection with such loan transaction in reliance on this Statement.

/s/ David R. Beach /s/ Linda M. Beach
DAVID R. BEACH LINDA M. BEACH
Consumer Signature

8-20-86
Date

DISTRIBUTION: White copies for signatures – Borrowers; Canary copies – Borrowers; Pink copy – File

PLAINTIFF'S EXHIBIT #3

(LOGO)
GREAT WESTERN SAVINGS
A FEDERAL SAVINGS AND LOAN ASSOCIATION
FEDERAL TRUTH-IN-LENDING
DISCLOSURE STATEMENT

1675 PALM BCH. LAKES BLVD. #210
WEST PALM BEACH, FLA 33401
Date AUGUST 15, 1986
Applicant[s]: ~~Application~~/Loan
No. 0-474423-3

DAVID R. BEACH
LINDA M. BEACH
5870 SET-N-SUN PLACE
JUPITER, FL 33458

Subject Property: 5870 SET-N-SUN PLACE, JUPITER, FLORIDA 33458

ANNUAL PERCENTAGE RATE

The cost of your credit as a yearly rate, subject to change if this is a variable rate transaction.

++ 8.82*%

FINANCE CHARGE

The dollar amount the credit will cost you, based upon the current annual percentage rate which may change if this is a variable rate transaction.

$ 176,519.21*

AMOUNT FINANCED

The amount of credit provided to you or on your behalf.

$ 95,486.35*

TOTAL OF PAYMENTS

The amount you will have paid after you have made all payments as scheduled, based on the current annual percentage rate which may change if this is a variable rate transaction.

$ 272,005.56*

++ YOUR INITIAL CONTRACT RATE IS 8.750%

PAYMENT SCHEDULE

Number of Payments	Amount Payments	When Payments Are Due
		Monthly Beginning:
12	765.46	10/01/86
*348	755.23	10/01/87

* MEANS ESTIMATE

This is: XX A VARIABLE RATE LOAN __ A FIXED RATE LOAN

If a Variable Rate loan:

THE ANNUAL PERCENTAGE RATE AND THE TOTAL FINANCE CHARGE AND TOTAL OF PAYMENTS MAY INCREASE ILLEGIBLE ING THE TERM OF THIS TRANSACTION AS DESCRIBED IN THE SEPARATE DISCLOSURE DOCUMENTS PROVIDED ILLEGIBLE

INSURANCE: Property insurance (and flood insurance, if applicable) are required to obtain credit.
You may obtain property insurance from anyone you want that is acceptable to Great Western Savings.

If you obtain insurance from Great Western Financial Corporation Insurance Agency
our estimate of the annual property insurance premium is N/A
our estimate of the annual flood insurance premium is N/A .

SECURITY: You are giving a security interest in the subject property described above.

LATE CHARGE: If a payment is late, you will be charged a late charge of 5% of the payment.

PREPAYMENT: If you pay off early,
___ you may have to pay a penalty XX
you will not have to pay a penalty

ASSUMPTION
POLICY: XX Someone buying your property cannot assume the remainder of the loan contract on the origin Illegible

__ Someone buying your property may, subject to conditions of the Note and Security Instrument Illegible allowed to assume the remainder of the mortgage (loan).

Illegible as your contract documents and any other previously supplied disclosure documents for any additional information about non-payment, illegible demand features, variable annual percentage rate, any required repayment in full before the scheduled date, and prepayment refunds and illegible.

* *MEANS AN ESTIMATE*

I [We] hereby acknowledge receipt of the disclosure made in this notice together with copies of the documents provided.

I [We] acknowledge that this statement is neither a contract nor an obligation to make a loan.

/s/ David R. Beach 8-15-86 /s/ Linda M. Beach 8-15-86
DAVID R. BEACH DATE LINDA M. BEACH DATE

FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

DAVID R. and LINDA M. BEACH,

Defendants/Appellants

vs.

GREAT WESTERN BANK,

Plaintiff/Appellee

_____/

4 DCA
CASE NO.
94-1049

DOCKET FILE

Seq	Docket dt	Type Desc.
Opid	Strick fl	Comment
Seq	Docket dt	Type Desc.
		Comment
001	04/19/94	NOTICE OF APPEAL FILED 04/14/94
002	04/19/94	ASSIGNED TO TEMPORARY PANEL
003	04/19/94	FILING FEE PAID Receipt number is 940818
004	04/20/94	APLT TO FILE ORDER APPEALED 15 DAYS.
005	05/05/94	NOTICE OF FILING ORDER BEING APPEALED.
006	05/20/94	MOT-EOT CORT RPTR TRANS-CR REQ 30 DAYS TO 6/28.
007	05/27/94	GR EOT COURT RPTR TRANS-CR REQ TO 6/28.
007	05/27/94	GR EOT COURT RPTR TRANS-CR REQ TO 6/28.
008	06/13/94	NOTICE OF SIMILAR CASE PENDING WITH 94-1551.

009	06/21/94	ORD-SUA SPONTE CONSOLIDATED WITH 94-1551 FOR
010	07/21/94	MISCELLANEOUS MOTION TO FILE APPENDIX.
018	08/17/94	ORD-GRANTING MISC. MOTION TO FILE APPENDIX.
011	07/21/94	MISCELLANEOUS MOTION FOR EXPANDED O.A.
046	02/28/95	ORD-DENYING MISC. MOTION FOR EXPANDED ORAL ARGUMENT.
012	07/21/94	INITIAL BRIEF ON MERITS (4)
013	08/01/94	RECEIVED RECORDS TWO (2) VOLUMES.
014	08/11/94	MOT-EOT. TO FILE ANSWER BRIEF 20 DAYS
017	08/17/94	ORD-EXTENDING ANSWER BRIEF (SERVED) WITHIN 20 DAYS.
015	08/17/94	ORD-DEFERRING TO MERITS PANEL 7/21/94 MOT. FOR EXPANDED O.A.
016	08/17/94	MULTIPLE ORD START
017	08/17/94	ORD-EXTENDING ANSWER BRIEF (SERVED) WITHIN 20 DAYS.
018	08/17/94	ORD-GRANTING MISC. MOTION TO FILE APPENDIX.
019	08/17/94	MULTIPLE ORDER END
020	08/17/94	APPENDIX TO INITIAL BRIEF.
021	09/02/94	MOT-TO DISMISS
027	12/21/94	ORD-DENYING MOT. TO DISMISS
022	09/09/94	NOTICE OF FILING EXHIBIT "A". (TO MOTION/DISMIS
023	09/19/94	RESPONSE TO MOTION TO DISMISS.

024	09/22/94	NOTICE OF SIMILAR CASE PENDING WITH 93-2566, 94-538 AND 94-66
025	09/23/94	RECEIVED EXHIBITS ONE (1) ENVELOPE.
026	10/25/94	NOTICE OF SIMILAR CASE PENDING WITH 94-2674,94-538 & 93-2566.
027 1	12/21/94	ORD-DENYING MOT. TO DISMISS
028 1	12/22/94	CASE PERFECTED
029 1	01/03/95	MISCELLANEOUS MOTION TO ENFORCE AUGUST 17, 1994 ORD
034	01/11/95	ORD-DENYING MISC. MOTION TO ENFORCE 8/17/94 ORDER.
030 1	01/03/95	RESPONSE TO MOTION TO ENFORCE 8/17 ORD.
031 1	01/03/95	MOT-EOT. TO FILE ANSWER BRIEF TO 1/6.
033	01/11/95	ANSWER BR TO BE FILED IN COURT (SERVED) BY 1/6/95. * * * FINAL * * *
032 1	01/11/95	MULTIPLE ORDER START
033 1	01/11/95	ANSWER BR TO BE FILED IN COURT (SERVED) BY 1/6/95. * * * FINAL * * *
034 1	01/11/95	ORD-DENYING MISC. MOTION TO ENFORCE 8/17/94 ORDER.
035 1	01/11/95	MULTIPLE ORDER END
036 1	01/06/95	APLEE'S ANSWER BRIEF (4)

037	01/06/95	APPENDIX
1		(4) TO ANSWER BRIEF.
038	01/06/95	MOT-FOR ATTORNEY'S FEES
1		
039	01/17/95	APLNT'S REPLY BRIEF
1		(4)
040	03/16/95	ORAL ARGUMENT DATE SET WPB
041	03/16/95	180 DAYS START DATE
042	02/02/95	MOT-TO REMAND TO REMAND GREAT WESTERN'S DIS-
047	02/28/95	ORD-DENYING REMAND
043	02/16/95	RESPONSE TO MOT/REMAND DISMISSAL, ETC.
044	02/23/95	NOTICE-SUPPLEMENTAL AUTHORITY
045	02/28/95	MULTIPLE ORDER START
046	02/28/95	ORD-DENYING MISC. MOTION FOR EXPANDED ORAL ARGUMENT.
047	02/28/95	ORD-DENYING REMAND
048	02/28/95	MULTIPLE ORDER END
049	03/09/95	NOTICE OF SIMILAR CASE PENDING 94-2958, ETC.
050	03/13/95	NOTICE-SUPPLEMENTAL AUTHORITY
051	03/14/95	NOTICE-SUPPLEMENTAL AUTHORITY
052	03/24/95	NOTICE-SUPPLEMENTAL AUTHORITY
053	04/04/95	NOTICE-SUPPLEMENTAL AUTHORITY
054	04/13/95	NOTICE-SUPPLEMENTAL AUTHORITY
055	06/20/95	NOTICE OF SIMILAR CASE PENDING CASE #'S 94-1072, ETC.

056	09/19/95	NOTICE-SUPPLEMENTAL AUTHORITY
057	09/29/95	NOTICE-SUPPLEMENTAL AUTHORITY
058	10/10/95	NOTICE OF SIMILAR CASE PENDING (FILED IN 95-1965) 94-1072, ET
059	12/05/95	NOTICE-SUPPLEMENTAL AUTHORITY
060	01/17/96	NOTICE-SUPPLEMENTAL AUTHORITY
061	01/31/96	DISP-AFFIRMED
1		OP (25)
062	02/12/96	MULTIPLE MOTION START
1		
063	02/12/96	MOT-FOR REHEARING
1		*AND/OR*
075	04/15/96	ORD-DENYING REHEARING
064	02/12/96	MOT-REHEARING EN BANC
1		
076	04/15/96	ORD-DENYING REHEARING EN BANC
065	02/12/96	MULTIPLE MOTION END
1		
066	02/20/96	NOTICE-SUPPLEMENTAL
1		AUTHORITY AS TO MOT/ REHEARING, ETC.
067	02/27/96	MOT-FOR EOT TO FILE RESPONSE
1		(15 DAYS) TO MOT/REHEARING, ET
068	03/01/96	ORD-GRANT EOT TO FILE RESPONSE 15 DAYS TO MOT-FOR REHEARING.
068	03/01/96	ORD-GRANT EOT TO FILE
1		RESPONSE 15 DAYS TO MOT-FOR REHEARING.

069	03/18/96	MOT-FOR EOT TO FILE RESPONSE
1		(SEVEN DAYS) TO MOT/ REHEARING.
070	03/21/96	ORD-GRANT EOT TO FILE RESPONSE 7 DAYS TO MOTION FOR REHEARING.
070	03/21/96	ORD-GRANT EOT TO FILE
1		RESPONSE 7 DAYS TO MOTION FOR REHEARING.
071	03/21/96	NOTICE-SUPPLEMENTAL
1		AUTHORITY (IN SUPPORT OF MOT/REHEARING)
072	03/28/96	REPLY
1		TO MOT/REHEARING, ETC. (W/ APPND
073	04/03/96	NOTICE-SUPPLEMENTAL
1		AUTHORITY (IN SUPPORT OF MOT/REHEARING)
074	04/08/96	MOT-TO STRIKE
1		AE'S REPLY TO MOT/ REHEARING, ET
077	04/15/96	ORD-DENYING STRIKE
075	04/15/96	ORD-DENYING REHEARING
1		
076	04/15/96	ORD-DENYING REHEARING EN
1		BANC
077	04/15/96	ORD-DENYING STRIKE
1		
078	04/15/96	WEST PUBLISHING
1		
079	04/24/96	MOT-TO STAY
1		PENDING SUPREME COURT REVIEW.
084	05/17/96	ORD-GRANTING STAY PENDING SUPREME COURT REVIEW.

080	04/24/96	NOTICE O/DISCRETN. JURI. TO SC
0		WITH FEE.
081	04/24/96	CASE REVIEW SENT TO S.C.
0		
082	05/14/96	ACK. RECEIPT FROM SC-PET
0		F/REV #87,835.
083	05/14/96	SUPREME COURT BRIEF
0		SCHEDULED AND RECORD DUE 6/10/96.
084	05/17/96	ORD-GRANTING STAY
0		PENDING SUPREME COURT REVIEW.
085	06/03/96	RECORD SENT TO SUPREME
0		COURT
086	04/28/97	SUPREME COURT DISPOSITION
0		SC#87,835 APPROVE
087	04/28/97	SUPREME COURT MANDATE
0		
088	04/28/97	RECORD RETURNED TO DCA
0		FROM SC
089	04/28/97	MISCELLANEOUS DOCKET ENTRY
0		SUP.CRT.ORD.DENYING REHEARING.
090	05/12/97	MANDATE
1		
091	05/12/97	CASE CLOSED
1		
092	05/13/97	MOT-TO STAY ISSUANCE
1		O/MANDATE PENDING RESOLUTION OF VARIABLE
101	07/17/97	DENY MOT. T/STAY ISSU. MANDATE
093	05/13/97	MOT-TO STAY ISSUANCE
1		O/MANDATE PENDING U.S. SUPREME COURT

101	07/17/97	DENY MOT. T/STAY ISSU. MANDATE
094 1	05/16/97	MISCELLANEOUS MOTION TO TREAT PREVIOUSLY FILE MOTIO
102	07/17/97	ORD-DENYING MISC. MOTION TO TREAT PREVIOUSLY FILED
095 1	05/22/97	NOTICE-SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOT/STAY MANDATE
096 1	05/27/97	RESPONSE TO AA'S MOTION TO RECALL AND
097	05/30/97	MISCELLANEOUS DOCKET ENTRY
1		SUPREME COURT ORDER GRANTING A
098 1	06/06/97	NOTICE OF FILING SUPREME COURT ORDER STAYING MD PER PANEL DO NOT ISSUE ANY ORDERS UNTIL STAY EXPIRES.
099 1	06/17/97	NOTICE-SUPPLEMENTAL AUTHORITY
100 1	07/03/97	SUPREME COURT MANDATE
101 1	07/17/97	DENY MOT. T/STAY ISSU. MANDATE
102 1	07/17/97	ORD-DENYING MISC. MOTION TO TREAT PREVIOUSLY FILED

David R. BEACH and Linda M. Beach, his wife, Appellants,

v.

GREAT WESTERN BANK, Appellee.

No. 94-1049.

District Court of Appeal of Florida, Fourth District.

Jan. 31, 1996.

Rehearing and Rehearing En Banc Denied April 15, 1996.

Mortgagee instituted foreclosure proceedings against mortgagors. Mortgagors asserted as affirmative defense the right to rescind under Truth in Lending Act (TILA) and damages under TILA. The Circuit Court, Palm Beach County, Thomas E. Sholts, J., rendered final judgment for mortgagee, and mortgagors appealed. The District Court of Appeal, Warner, J., held, in case of first impression in Florida, that statutory right of rescission under TILA expired three years after closing of transaction and could not be revived as defense in recoupment in foreclosure action.

Affirmed; question certified.

Pariente, J., dissented with opinion.

Appeal from the Circuit Court for Palm Beach County; Thomas E. Sholts, Judge.

James A. Bonfiglio of James A. Bonfiglio, P.A., Boynton Beach, for appellants.

Steven Ellison of Broad and Cassell, West Palm Beach, for appellee.

WARNER, Judge.

This is a case of first impression in Florida. The issue presented is whether a consumer has a right to rescind a mortgage on a home, under 15 U.S.C.A. section 1635 of the Truth in Lending Act (TILA), as a defense by way of recoupment to the lender's foreclosure action, when the defense is asserted beyond the three year period set forth in the statute. *See* TILA, 15 U.S.C.A. § 1601 et seq. (West 1982 & Supp.1995). We hold that under Florida law, a consumer is not entitled to rescind the mortgage transaction and is limited to a damage set-off as provided in TILA.[1]

Congress originally enacted TILA to create disclosure requirements to insure meaningful disclosure of credit terms by lenders so that consumers could determine the reasonableness of a lender's charge. *E.g., Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir.1975). As part of the statutory requirements, the consumer is given the right to rescind a transaction that results in the

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[1] We have reviewed the Truth in Lending Act Amendments of 1995, which the appellants have supplied as supplemental authority. Pub.L. No. 104-29, 109 Stat. 271 (September 30, 1995). Section 8 of the Truth in Lending Act amendments of 1995 addresses rescission rights in foreclosure and amends 15 U.S.C. section 1635. The amendments in part provide that "[n]oth'ng in this subsection affects a consumer's right of rescission in recoupment under State law." *Id.* § 8 (to be codified at 15 U.S.C. § 1635(i)(3)). While we do not analyze whether and to what extent these amendments have retroactive effect, we have analyzed and applied Florida law to resolve the instant case.

creditor taking a security interest in the consumer's principal dwelling. 15 U.S.C.A. § 1635(a). The consumer has an absolute right to rescind the agreement for three business days following the closing of the transaction. *Id.* Rescission may be extended for up to three years if the creditor fails to make all material disclosures to the borrower as required by TILA. 15 U.S.C.A. § 1635(f); Regulation Z, 12 C.F.R. Pt. 226.23(a) (1994) ("Reg. Z"). Exercise of the right to rescind under 15 U.S.C.A. section 1635 results in the discharge of the consumer's liability for any finance and other charges paid by the consumer and in the discharge of any security interest taken in conjunction with the extension of credit. 15 U.S.C.A. § 1635(b); *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3d Cir.), *aff'd in part*, 898 F.2d 907 (3d Cir.1990). Thus, the lender would only be able to collect on the principal of the loan and would lose any security for the collection of the loan.

TILA also provides for money damages for TILA violations. 15 U.S.C.A. § 1640(a)(1)-(2)(A). While there is a one year limitation on the commencement of a cause of action for money damages, the statute specifically provides that as a defense of recoupment or set-off to an action for collection of the debt, a consumer may assert violations of TILA and the damages to which the consumer would be entitled under the statute. 15 U.S.C.A. § 1640(e).

With that brief overview of TILA, we turn now to the facts of this case. The appellants first obtained a mortgage from First Fidelity Savings and Loan for the construction of their residence. The mortgage was not strictly a construction loan mortgage as it reflected a 30-year

payout. There was no requirement for conversion to permanent financing in the loan. After completion of the construction, the appellants moved in, made two payments, and then entered into a another loan transaction with the appellee Great Western Bank ("the bank"), the proceeds of which were applied to pay off and satisfy the original mortgage loan. The bank provided appellants with Truth in Lending Act disclosure documents. At the closing, the bank furnished the appellants with the three day notice of their right to rescind. The loan transaction closed in August of 1986.

On December 1, 1991, the appellants defaulted on the loan by failing to make their installment payments. In June 1992, the bank instituted foreclosure proceedings. The appellants raised affirmative defenses to the foreclosure action, including the assertion of their right to rescind and TILA damage claims. In ruling in favor of the bank upon final judgment, the trial court found, alternatively, that based upon certain factual stipulations, the transaction was an exempt transaction not subject to rescission, and also that the failure of the appellants to assert the right to rescind within three years of the closing of the transaction was fatal to the claim. The court then determined the actual damages of $396 and statutory damages of $1,000 to which the appellants were entitled under TILA, set them off against the balance due the bank, and determined that the bank's lien was superior to all other encumbrances. The court did not immediately order foreclosure. From that order this appeal has been taken.

The parties stipulated that the loan from the bank was made to satisfy the original lender's construction

loan and to provide permanent financing. A mortgage loan secured to finance the acquisition or initial construction of a residence is exempt from the rescission requirements of TILA. 15 U.S.C.A. §§ 1635(e)(1), 1602(w). The staff commentary to Reg. Z, 12 C.F.R. Pt. 226.2(a), provides that where one creditor finances the initial construction of the residence and another creditor makes a loan to satisfy the construction loan and provide permanent financing, both transactions are residential mortgage transactions within the meaning of the exemption. Reg. Z, 12 C.F.R. Pt. 226, Supp. I, § 226.2, cmt. 2(a)(24)-4 (1994) (Official Staff Interpretations of Regulation Z). Based on the commentary together with the stipulation, the trial court found that both the First Fidelity loan and the bank's loan were residential mortgage transactions and therefore exempt from statutory rescission. On appeal, the appellants note that while the bank was paying off a construction loan, the original lender's loan not only was for construction but included permanent financing. In fact, the original loan partook of more characteristics of permanent financing than construction financing. Moreover, the appellants occupied their home for a few months before applying for the bank loan. Finally, the appellants more or less claim that the bank waived its right to assert an exemption from rescission because the bank in fact gave them that right in their disclosure documents at closing, thus acknowledging that the transaction was not exempt. We tend to agree that the stipulation is not dispositive and that the factual aspects of this transaction indicate that this is not an exempt transaction. However, further discussion of this point is unnecessary because of our other holding.

The Right of Rescission

The appellants contend that they can assert the right of rescission as a defense in recoupment for TILA violations even beyond the three year period of the statute, relying on *Dawe v. Merchants Mortgage and Trust Corp.*, 683 P.2d 796 (Colo.1984).[2] The trial court rejected the rationale of *Dawe*, determining that Congress's omission of recoupment or set-off in the section providing for rescission, 15 U.S.C.A. section 1635(f), while inserting in it the damages provision, 15 U.S.C.A. section 1640(e), established that the right of rescission was not a defense in recoupment and that the right expired after three years. We agree for the following reasons.

In 15 U.S.C.A. section 1635(f), Congress provides:

> An obligor's right of rescission **shall expire three years after the date of consummation of the transaction** or upon sale of the property, whichever occurs first. . . .

15 U.S.C.A. § 1635(f) (emphasis supplied). In *Dawe*, the Colorado Supreme Court held that a debtor's demand for section 1635(f) rescission constituted a defense in the nature of recoupment and thus, the debtor was not barred by the three year expiration period. The court relied on *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935), which held that because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded,

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[2] *Dawe* has been relied on by other courts, and we recognize that there is a split of authority in the country on this issue. We do not cite or distinguish the other cases because their reasoning is consistent with Dawe.

it is never barred by the statute of limitations so long as the main action itself is timely. 295 U.S. at 262, 55 S.Ct. at 700-701. However, the recoupment ordered by the Supreme Court was the offset of estate taxes erroneously paid on a transaction, when raised as a defense to a suit by the government for the payment of income taxes on the same transaction. The court viewed the retention of the estate taxes paid to the government through mistake as tantamount to fraud, and the government's retention of those tax payments was unjust and immoral. Recoupment was therefore equitable in nature to prevent an unjust result. In concluding recoupment could be raised as a defense, the Court cited as authority the case of *Williams v. Neely*, 134 F. 1 (8th Cir.1904). That case emphasized that "recoupment is, in its nature and essence, an equity. . . . Recoupment is the keeping back of something that is due because there is an equitable reason for holding it." *Id.* at 4-5.

The right of rescission for violations of TILA does not, in our opinion, fall within those equitable reasons required to apply recoupment. Because under section 1640 the borrower is entitled to assert damages as a defense in recoupment, the borrower is compensated for any monies which the creditor may have collected or will collect for violations of TILA. The further remedy of rescission under TILA is a penalty provision to the creditor, not a remedy required by equity and good conscience beyond the statutory period of three years.

Dawe also suggests that it is necessary to allow rescission as recoupment beyond the three year period,

because if it were barred, lenders could avoid the penalties of TILA by waiting three years to sue on the borrowers' default and thereby frustrate the statutory policy. First, we find it unlikely that a lender would hold a loan in default for two or three years without taking action to collect it. Modern banking regulations make this highly unlikely. Regardless of the lender's actions, default on the note by the borrower is the triggering event of any suit to foreclose on the security interest. If the borrower pays on the loan as required, there is no reason for the lender to sue the borrower. Therefore, it is entirely within the control of the borrower as to whether the creditor has the ability to foreclose on its security interest in the residence. The buyer could bring a direct claim during the first three years, and after that time, merely by defaulting on the mortgage and forcing a foreclosure action, the buyer could also secure rescission by way of recoupment. Thus, by using recoupment as a method of asserting rescission, the buyer could take advantage of the remedy throughout the entire life of the secured transaction, rendering the statutory limitation meaningless. For this reason, we do not find that Dawe's argument that lenders could take advantage of the claim is persuasive. Borrowers also could take advantage of the creditor by strategically defaulting and asserting rescission as a recoupment defense.

Whether one may agree with *Dawe* or not, the ultimate question is whether as a matter of Florida law, the defensive assertion of rescission should be allowed. The appellants argue that *Allie v. Ionata*, 503 So.2d 1237 (Fla.1987), permits the assertion of their statutory right of rescission as a defense in recoupment. *Allie* recognized

the basic rule that recoupment may be asserted even though the underlying claim is barred by the applicable statute of limitations as an independent cause of action. It further held that once a party files an affirmative action, the defendant may assert any affirmative defense or compulsory counterclaim which stems from the same transaction. *Id.* at 1240. *Allie* addressed a claim barred by a statute of limitations, which bars not the right, but the remedy. *Id.*

As explained later in *Rybovich Boat Works, Inc. v. Atkins*, 585 So.2d 270 (Fla.1991), the holding of *Allie* "rested primarily on considerations of public policy and fairness as well as an analysis of the purpose of statutes of limitation." *Id.* at 271. *Allie* considered the application of limitations to claims for damages at common law. *Rybovich*, on the other hand, refused to permit the assertion of a time-barred claim for specific performance of a real estate contract as a defense to an action for damages under the contract, noting the adverse consequences on the free alienability of title through the resurrection of a barred specific performance claim. In the instant case, the bank points out that in its report to Congress on Truth In Lending in January 1972, the Board recommended that a limitation on the right to rescind be established because the title to residential real properties may become clouded by the uncertainty regarding the right of rescission. *Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth In Lending for the Year 1971.* That limitation was eventually enacted as section 1635(f).

The three year limitation contained within section 1635(f) is not a limitation on the remedy, but an expiration of the right after three years from the date of the closing of the transaction. In *Bowery v. Babbit*, 99 Fla. 1151, 128 So. 801 (Fla.1930), the court noted a general rule of construction:

> [W]here a statute confers a right and expressly fixes the period within which suit to enforce the right must be brought, such period is treated as the essence of the right to maintain the action, and that the plaintiff or complainant has the burden of affirmatively showing that his suit was commenced within the period provided. [citations omitted]. In other words, when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right.

Id. at 1163, 128 So. at 806 (citations omitted). Our court followed that rule in *Fowler v. Matheny*, 184 So.2d 676 (Fla. 4th DCA 1966), in construing a limitation period contained within the Uniform Sale of Securities Law:

> F.S.A. § 517.21 created an entirely new right of action that did not exist at common law and expressly attached thereto, without any exception, the proviso that the action must be brought within two years from the date of sale [of securities]. Such a limitation of time is not like any ordinary statute of limitation affecting merely the remedy, but it enters into and becomes a part of the right of action itself, and if allowed to elapse without the institution of the action, such a right of action becomes extinguished and is gone forever.

Id. at 677; *see also Special Disability Trust Fund v. Southern Bell Tel. & Tel. Co.*, 551 So.2d 575 (Fla. 1st DCA 1989).

This point was not addressed by *Dawe*, which made the assumption that section 1635(f) was a statute of limitations which barred a remedy as opposed to a special statutory action with its own limitation. However, this assumption is contrary to federal statutory construction principles. In *Simon v. United States*, 244 F.2d 703 (5th Cir.1957), the court explained the difference in terms much like *Bowery*:

> That this is hornbook law, a reference to 34 Am.Jur. 'Limitation of Actions', Sec. 7, 'Qualifications Annexed to Right of Action' will show: 'A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. *Such a provision will control, no matter in what form the action is brought.* The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the

> right of action no longer exist, and the defendant is exempt from liability. * * * ' (Emphasis supplied.)

Id. at 704-05. Thus, Florida law and federal law appear consistent as to the proper analysis of this statute.

The right of rescission of a security interest for material violations of TILA disclosures is not a right existing under the common law. It is clearly and only the creation of statute. While the legislature may be without power to abolish common law rights, the legislature may create other rights and impose on them such limitations as it deems advisable. When it does, those limitations form part of the assertion of the right itself. *Bowery*. Here, a borrower has the right to rescind a transaction for TILA violations within three years of closing or until sale of the property. Therefore, based upon *Bowery*, *Fowler*, and *Simon*, that right was extinguished with the lapse of the three year period contained within the statute's terms.

Indeed, one may glean this construction from the very language of the statute itself. "An obligor's right of rescission *shall expire three years after the date of consummation of the transaction* or upon sale of the property, whichever occurs first. . . . " 15 U.S.C.A. § 1635(f) (emphasis supplied). The remedy is not merely barred: the right dies with the lapse of time.[3]

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[3] The statute is in the nature of what we term a statute of repose rather than a statute of limitation, as the time period runs not from the borrower's discovery of TILA violations but from the closing of the transaction. As to the distinction between statutes of limitation and statutes of repose, see generally *Kush v. Lloyd*, 616 So.2d 415 (Fla.1992).

Other portions of TILA also support our construction. Section 1640 provides for damages for TILA violations. While the statute contains a one year limitation for actions for damages, it also specifically provides that despite the limitation, damages may be sought as "defense by recoupment or setoff." Certainly, when Congress intended that recoupment should be allowed, it knew how to say it. *See Russello v. United States*, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (when Congress includes particular language in one section of a statute and omits it in another section of the same act, it is generally presumed Congress acts intentionally and purposely in disparate inclusion or exclusion). Therefore, if this were a matter of legislative intent, traditional rules of statutory construction would lead us to the conclusion that we cannot infer a Congressional intention to permit rescission beyond three years. Thus, there appears no policy reason apparent in the statute for our court to permit an expired right to be asserted as an equitable defense of recoupment.

A Florida case most closely analogous to the present case is *Devlin v. Aetna Finance Co.*, 379 So.2d 972 (Fla. 5th DCA), *cert. denied*, 389 So.2d 1108 (Fla.1980). In *Devlin*, the creditor had filed suit to recover a debt to which the borrower asserted TILA violations as a common law recoupment defense. At the time the suit was instituted, section 1640 of TILA provided that an action for damages expired one year from the closing of the transaction. There was no extension for recoupment. The county court and then the circuit court sitting in its appellate capacity both determined that the defense could not be asserted beyond the statutory limitation. On petition for writ of

certiorari review, the district court found no departure from the essential requirements of law, holding as follows:

> Whether the statutory right to recover twice the finance charges under the Federal Truth In Lending Act may be asserted beyond the one-year statutory limitation is, in our opinion, a legislative decision for Congress. The statute as written provides a one year limitation which we find clear and properly enforceable to bar the recoupment defense here asserted.
>
> Congress well knew that most debtors would become aware of creditor violations in the Truth In Lending Act only when the debtor contacts a lawyer to defend a suit on the debt brought by the creditor. The policy decision of whether the penalty of twice the finance charge is an affirmative cause of action or a defense is one best left to the Legislature rather than the courts. Congress presumably enacted the one-year limitation for some reason and they were aware of the realities of consumer credit transactions as indicated above. We are advised by counsel for petitioners than an amendment to the Truth In Lending Act is pending in Congress which would specifically answer the question posed in these cases. We are convinced that the remedy of the petitioners/debtors herein is by a change in the statute.

Id. at 973-74 (citation and footnote omitted). The court was referring to the 1980 amendment which permitted the assertion of damages as a defense in recoupment beyond the one year limitation. As noted before, Congress did not see fit to add the same savings clause to

section 1635. The reasoning of *Devlin* is consistent with our analysis.

The appellants point to the policy of the courts that TILA be liberally construed in favor of the consumer to effectuate its remedial purpose. *See Flesher v. Household Fin. Corp.*, 640 F.2d 861 (6th Cir.1981); *Riggs v. Government Employees Fin. Corp.*, 623 F.2d 68 (9th Cir.1980). However, as noted in *Riggs*, the courts which have construed the Act as remedial have been concerned with the damage remedies under section 1640. *Riggs*, 623 F.2d at 70. By allowing damages for TILA violations as a claim in recoupment, the lender is penalized for violations and the consumer is entitled to offset the indebtedness either by the borrower's actual damages or by statutory damages, whichever is greater. A liberal construction of TILA does not require the court to add remedies where Congress chose not to permit them, particularly where the alternative remedy of damages is available. To allow the consumer to assert the expired right of rescission in recoupment as a matter of public policy where Congress has not chosen to extend it does not sufficiently provide us with a public policy reason for extending recoupment. Under the law of Florida and our construction of TILA, we hold that the statutory right of rescission under TILA expires three years after the closing of the transaction and may not be revived as a defense in recoupment in an action to collect the debt upon the buyer's default.

With respect to the other points raised on appeal, we find that the trial court committed no reversible error, and therefore we affirm the final judgment.[4]

Because this is a question of great public importance, potentially affecting thousands of mortgages in the state, we also certify the following question:

> UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635 BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?

DELL, J., concurs.

PARIENTE, J., dissents with opinion.

PARIENTE, Judge, dissenting.

The majority concludes that Florida law would not permit a debtor to raise an untimely claim for rescission under TILA as a defense to a mortgage foreclosure action. I disagree and find support for the ability of the debtor to raise the claim defensively in both *Allie v. Ionata*, 503 So.2d 1237 (Fla.1987), and *Beekner v. L.P. Kaufman, Inc.*, 145 Fla. 152, 198 So. 794 (1940).

The majority's rejection of the defensive use of rescission rests on its interpretation of congressional intent. To

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[4] We note that the trial court found that the bank violated TILA by including the intangible tax as part of the amount financed. We have recently held in *Pignato v. Great Western Bank*, 664 So.2d 1011 (Fla. 4th DCA 1995), that this is not a violation of TILA. However, the bank did not cross-appeal this issue. Therefore, it has not been preserved for review.

the extent that the majority's opinion turns on construing congressional intent by reading the provisions of TILA in *pari materia*, it is certainly reasonable, based on a comparison of 15 U.S.C.A. § 1635(f) with 15 U.S.C.A. § 1640(e), to reach a conclusion that Congress intended to cut off the right of rescission after three years, allowing only set-off of damages as a defense in recoupment. *See* Truth in Lending Act, 15 U.S.C.A. §§ 1601-1677 (West 1982 & Supp.1995).

However, this construction of congressional intent is less reasonable in light of the 1995 amendment, § 1635(i)(3), which provides that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." This amending language, which applies to all consumer credit transactions in existence, runs contrary to an interpretation that Congress intended to treat the right of rescission as governed by a strict statute of repose, precluding the ability of the debtor to raise it defensively. *See James v. Home Constr. Co.*, 621 F.2d 727 (5th Cir.1980); *Dawe v. Merchants Mortgage & Trust Corp.*, 683 P.2d 796, 798 n. 5 (Colo.1984). *But see Jamerson v. Miles*, 421 F.Supp. 107 (N.D.Tex.1976), *disagreed with, James*, 621 F.2d at 728; *Fenton v. Citizens Sav.*, 400 F.Supp. 874 (C.D.Mo.1975). Moreover, § 1635(f) was not part of the original statute, but rather has been described as part of a series of technical amendments designed to improve the administration of TILA.[5] In fact the original version of

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[5] In *James v. Home Construction Co.*, 621 F.2d 727 (5th Cir.1980), the fifth circuit addressed the issues of whether the newly-enacted three-year statute of limitations should apply prospectively and whether a TILA cause of action survives the

§ 1635, which created the statutory remedy of rescission, had no time limitations.

I would follow the rationale first enunciated in *Dawe* and subsequently adopted by the courts in *FDIC v. Ablin*, 177 Ill.App.3d 390, 126 Ill.Dec. 694, 532 N.E.2d 379 (1988), and *Community National Bank & Trust v. McClammy*, 138 A.D.2d 339, 525 N.Y.S.2d 629 (1988), that the debtor's right to rescind, while barring a claim for affirmative relief after the limitations period has run, is not a bar to asserting that claim as a defense. These courts, however, did not discuss whether the rescission remedy would be

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death of the party. James rejected the notion that § 1635(f) was a limitation on the existence on the substantive right to rescind rather than a true statute of limitations. The court observed:

> The fact that s. 1635 is a statutorily created right and not a common law one should make little difference in a consideration of whether or not this cause of action survives. Rather, the key inquiry in a situation like this one centers on what was the Congressional intent in passing § 1635(f). We think it clear that Congress meant to have the statute applied prospectively. First, the Truth-in-Lending Act, a remedial act, has usually been given a broad liberal interpretation since it is assumed that was the intent of Congress. *Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133 (10th Cir.1974). Second, the Conference Committee report on the Truth-in-Lending Act amendments of which s. 1635(f) were [sic] a part, described these amendments as "a series of basically technical amendments designed to improve the administration of the Truth in Lending Act." H.R.Conf.Rep. No. 93-1429, 93d Cong., 2d Sess. (1974), U.S.Code Cong. & Admin.News 1974, pp. 6119, 6152.

Id. at 729.

applied in a different manner because it was raised defensively. Yet, the *Dawe* court did observe that the debtors did not seek restitution of the installment payments; rather, they sought to avoid liability for future payments on the note. *Dawe*, 683 P.2d at 799.

Part of the difficulty in analyzing this issue has been the use of the concept of rescission by way of recoupment.[6] Although historically the plea of recoupment differed from the plea of set-off in some significant respects, the distinctions between the pleas have been largely eliminated by statute and by rules of modern pleading as explained in some detail by Justice Shaw in *Cherney v. Moody*, 413 So.2d 866 (Fla. 1st DCA 1982), adopted, *Allie*, 503 So.2d at 1239. Thus, the over-all concept, whether referred to as recoupment, set-off, compulsory counterclaim or affirmative defense, is that a party otherwise barred from instituting an action because of a time limitation was freed from that bar when acting in a defensive posture. *Allie*. The Eleventh Circuit in *Smith v. American Financial Systems*, 737 F.2d 1549, 1552 (11th Cir.1984), enunciated a three-part test for recoupment: 1) the TILA

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[6] Recoupment was a plea of common law origin arising from the same transaction which did not allow the recovery of an affirmative judgment; whereas setoff – a defense of statutory origin – could arise from a separate transaction and would permit recovery of an affirmative judgment. Modern rules of procedure have largely obliterated the historical distinctions. *See Cherney v. Moody*, 413 So.2d 866 (Fla. 1st DCA 1982), adopted, *Allie v. Ionata*, 503 So.2d 1237, 1239 (Fla.1987). For a discussion of the divergent authority between the courts in viewing TILA claims as either pleas of set-off or recoupment, see generally *Smith v. American Financial Systems*, 737 F.2d 1549, 1552-53 (11th Cir.1984).

violation and the creditor's debt arose from the same transaction; 2) the debtor is asserting the claim as a defense; and 3) the main action is timely. All three prerequisites are satisfied here.

The majority views rescission as having inflexible and draconian ramifications for the lender automatically resulting in cancellation of its security interest.[7] Certainly when viewed in this light, rescission varies significantly from the type of claims which could traditionally be pled as a defense in recoupment.

However, § 1635(b) provides that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court." *See also* 12 C.F.R. § 226.23(d)(4) ("[t]he procedures outlined . . . may be modified by court order"). Rather than creating an inflexible penalty for TILA violations, courts addressing this issue have permitted judicial modification of the statutory rescission process. *See, e.g., Williams v. Homestake Mortgage Co.*, 968 F.2d 1137 (11th Cir.1992). When viewed as a flexible remedy, a "court may impose conditions that run with the voiding of a creditor's security interest upon terms that would be equitable and just to the parties in view of all surrounding circumstances." *Id.* at 1142. In *Williams*, the bank's request had been to condition voiding of the security interest upon the debtor's return of the loan proceeds:

> In deciding whether or not to impose conditions upon Williams, the district court should

[7] In support of this conclusion, the majority cites to the language of § 1635(b) and *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3d Cir.), *aff'd in part*, 898 F.2d 907 (3d Cir.1990).

> consider traditional equitable notions, including such factors as the severity of Homestake's TILA violations and whether Williams has the ability to repay the principal amount. While the goal should always be "to restor[e] the parties to the status quo ante," [citations omitted] rescission must also maintain its vitality as an enforcement tool.

Id. If rescission can be applied as a flexible equitable remedy, there appears to be compelling public policy reasons for allowing rescission to be pled as a defense in recoupment if otherwise allowed by state law, with the precise method of enforcing the remedy left to judicial determination based on the surrounding circumstances.

If TILA does not expressly preclude a debtor from raising rescission as a defensive claim, then the question is whether Florida law otherwise would prohibit it. The majority concludes that Florida law would bar a debtor's right to raise rescission as an affirmative defense or compulsory counterclaim. I respectfully disagree.

Florida clearly adheres to the principle that the defense of recoupment may be asserted even though the underlying claim is barred by the applicable statute of limitations as an independent cause of action. See *Allie*. In its holding, *Allie* relied on *Beekner*, which recognized the right of the debtor to raise the defense of usury when a lender sued on a usury-infected contract, even though the claim of usury as an affirmative cause of action would have been barred. In *Beekner*, the lender sued to foreclose a mortgage securing notes for a loan. The debtor raised usury as a defense to defeat foreclosure. Our supreme court first pointed to the public policy considerations of

allowing the debtor to raise usury, observing that "a contrary holding would enable the lender to purge a usury infected contract by the simple process of awaiting the running of the statute of limitations before bringing the suit." *Beekner*, 145 Fla. at 156, 198 So. at 796. The court went on to explain that:

> This view, regardless of the nicety of pleading is strengthened by the general proposition that a defense should be as long-lived as a cause of action. . . . This rule in law would not be more generous in its effect than a similar one in equity.

Id. at 156-57, 198 So. at 796. The *Beekner* court approved of the use of usury as a shield to defeat recovery, but left unanswered the question of whether the time-barred claim could also be used as a sword to obtain affirmative relief. That question was answered in *Allie*.

In *Allie* our supreme court held that not only could a time-barred claim be raised as a defense, but the claim could be used as a vehicle for obtaining affirmative relief instead of merely defeating recovery. *Allie* concerned a seller who sued for the unpaid balance on the notes for two tracts of land. The buyer then interposed the seller's fiduciary breach and pled recoupment as a defense, requesting restitution and rescission of the contracts for the sale of the land. Our supreme court allowed the defensive claims of rescission and restitution, even though the statute of limitations for rescission of the contract had expired and the buyer would have been unable to institute an action for rescission.

The *Allie* court reasoned that limitation statutes were "designed as shields to protect defendants against unreasonable delays in filing law suits and to prevent unexpected enforcement of stale claims." 503 So.2d at 1240. However, these purposes are inapplicable when the same claim is raised as a defense:

> A party who seeks affirmative relief, whether through an original complaint or a counterclaim, effectively asserts that he is prepared to prosecute all aspects of that matter. Having sufficient knowledge of the facts to support a complaint and sufficient evidence to prosecute that complaint, he must be prepared to defend against any affirmative defenses arising therefrom. Thus, once a party files an affirmative action, he cannot thereafter profess to be surprised by or prejudiced by affirmative defenses or compulsory counterclaims that stem from that action.

Id. The holding in *Allie* rested primarily on considerations of public policy and fairness as well as an analysis of the purposes of statutes of limitations.

By permitting an otherwise-expired cause of action to be raised as an affirmative defense or a compulsory counterclaim, *Allie* allowed the defendant to recover an affirmative judgment. Because the defensive claims included restitution and rescission, the holding in *Allie* is particularly applicable to the analysis of what defenses Florida would allow a debtor to raise under TILA in a case arising from the same loan transaction.

Rybovich Boat Works v. Atkins, 585 So.2d 270, 272 (Fla.1991), while approving *Allie*, did not extend the

defense of recoupment to allow a time-barred action for specific performance of a contract for the purchase and sale of real property. However, our supreme court specifically acknowledged that other remedies available to an aggrieved buyer could include rescission as well as liquidated damages. *Id.* Allowing a debtor to raise a TILA defense to a suit for foreclosure on a mortgage is far closer to *Beekner* where the effect of allowing a time-barred claim of usury was to defeat the foreclosure action and to *Allie* where the court allowed the defensive claims of restitution and rescission.

I also disagree with the majority's reasoning that because the TILA cause of action runs from the date of the incident the principles underlying the defense of recoupment as explained in *Allie* and *Beekner* are rendered inapplicable. Although TILA has created a new statutory cause of action, the remedy of rescission is one derived from the common law. The statute modifies the common law right of rescission and renders it an available remedy for statutory violations of TILA. Also, the cases cited by the majority do not address the issue of whether an expired cause of action could nevertheless be raised defensively. Because the right of rescission is one derived from the common law, I do not see how it could be abrogated without a clear statutory expression of intent to do so – especially in light of the 1995 amendments which added the language stating that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." *See James*.

Because there is no question that TILA defenses can be raised and presented to the trial court in a suit for mortgage foreclosure, the controversy is over the extent

of the remedy available to rectify violations of TILA arising out of the loan transaction. In my opinion, allowing a defense of rescission in combination with vesting trial courts with the discretion to consider equitable factors before ordering rescission comes closest to effectuating the congressional intent of TILA without running afoul of Florida law.

Supreme Court of Florida Docket Sheet

Seq.	Date	Type
001	04/24/96	(NOTICE TO INVOKE DISCRET. JUR.)
002	04/30/96	(FILING FEE PAID) (Receipt No is960619)
003	04/25/96	(MOTION TO EXPEDITE)
004	05/09/96	(ORDER-SETTING BRIEF SCHEDULE & GRANTING MOTION TO EXPEDITE)
007	05/23/96	(INITIAL BRIEF ON MERITS WITH APPENDIX (ORIG & 7)
009	05/23/96	(MOTION-FOR ATTORNEYS FEES) (ORIG & 7)
010	05/23/96	(MOTION-OTHER SUBSTANTIVE) (FOR EXPANDED ORAL ARGUMENT 0&7)
011	05/24/96	(MOTION-LEV APPR AMICUS CURIAE NATIONAL CONSUMER LAW CTR)
012	05/30/96	(APPENDIX) (SUPPLEMENTAL) (ORIG & 7)
013	06/05/96	(RECORD) (TWO VOL. & ONE MANILA ENV. OF EXH)
014	06/10/96	(MOTION-EXTENSION OF TIME) (TO FILE REPLY TO PET'S INITAL BR)
015	06/11/96	(ORDER-OTHER SUBSTANTIVE) (DENIED MOT FOR EXT TO FILE RESP)

016	06/12/96	(ORDER-OTHER SUBSTANTIVE) (DENIED MOT. FOR LEAVE TO FILE)
017	06/12/96	(MOTION-FOR ATTORNEYS FEES) (ORIG & 7)
018	06/12/96	(ANSWER BRIEF ON MERITS) (0&7)-SERVED 5 DAYS LATE)
019	06/12/92	(APPENDIX) (ORIG & 7)
021	06/13/96	(RESPONSE) (OBJ) TO RS MOT/EXT OF TIME (0&7)
022	06/19/96	(REPLY BRIEF ON MERITS) (ORIG & 7)
023	06/19/96	(MOTION-TO STRIKE) (GREAT WESTERN'S BRF AS UNTIMELY)
024	06/26/96	(REPLY) (TO MOT. TO PET. MOT. TO STRIKE)
025	06/28/96	(ORDER-OTHER SUBSTANTIVE) (DENIED MOT TO STRK RESP'S BR AS)
028	07/18/96	(NO REQUEST CASE) (SENT TO WEST 7/29/96)
029	09/11/96	(NOTICE OF SUPPLMNT AUTHORITY) (ORIG & 7)
031	11/25/96	(NOTICE) (OF SIMILAR ISSUES)
032	02/13/97	(DISP-APPROVED) (WE ANSWER IN THE NEGATIVE.)
033	02/13/97	(WEST PUBLISHING) (692 SO.2D 146)

034 02/27/97 (MOTION-FOR REHEARING)
(RC)

035 03/06/97 (RESPONSE)
(ORIG & 7)

036 04/25/97 (REHEARING DISPOSED)
(DENIED (RC); PT FEES DENIED; RS)

037 04/25/97 (MANDATE)
(CC: COUNS (C:FILE) – VACATED)

038 04/25/97 (RETURNED RECORD)
(2 VOLS/1 ENVELOPE EXHIBITS)

039 05/09/97 (MOTION-FOR STAY-APPLY RVW
USSC) ( )

040 05/27/97 (RESPONSE) (TO PET'S MOT TO
STAY MANDATE)

041 05/28/97 (ORDER-OTHER SUBSTANTIVE)
(VACATED 4/25/97 MANDATE &
GRANT)

042 07/02/97 (MANDATE)
(CC: COUNS (c:FILE))

043 07/07/97 (MOTION-OTHER SUBSTANTIVE)
(FOR REISSUANCE OF MANDATE-
MOOT)

David R. BEACH, et ux., Petitioners,

v.

GREAT WESTERN BANK,
etc., Respondent.

No. 87835.

Supreme Court of Florida.

Feb. 13, 1997.

Rehearing Denied April 25, 1997.

Mortgagee brought foreclosure action against mortgagors. Mortgagors asserted, as affirmative recoupment defense, right to rescind under Truth-in-Lending Act (TILA) and damages under TILA. The Circuit Court, Palm Beach County, Thomas E. Sholts, J., entered judgment for mortgagee, and mortgagors appealed. The District Court of Appeal, Warner, J., 670 So.2d 986, affirmed and certified question to Supreme Court. The Supreme Court held that under Florida law, action for statutory right of rescission under TILA may not be revived as defense in recoupment beyond three-year expiration period.

Question answered.

James A. Bonfiglio, Boynton Beach, for Petitioners.

Steven Ellison of Broad and Cassel, West Palm Beach, for Respondent.

PER CURIAM.

We have for review *Beach v. Great Western Bank*, 670 So.2d 986 (Fla. 4th DCA 1996). We accepted jurisdiction to

answer the following question certified to be of great public importance:[1]

> UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635, BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE-YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?

670 So.2d at 994.

For the reasons expressed below, we answer the certified question in the negative and approve the Fourth District's decision. We find the majority's opinion persuasive and well-reasoned. The dissent is equally cogent; however, we believe the cases relied upon therein simply use the inappropriate analysis for statutory rescission by equating the expiration period with a statute of limitations. Nevertheless, we commend both the majority and the dissent for their thoughtful and comprehensive examination of the issue before us.

MATERIAL FACTS

Petitioners David and Linda Beach (the Beaches) obtained a bank mortgage to finance their home construction in 1985. The loan was a hybrid construction/home loan mortgage as it reflected a thirty-year payout. *Beach v. Great Western Bank*, 670 So.2d 986, 989 (Fla. 4th DCA 1996). Upon completion of construction, the Beaches

[1] We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

moved in, made two payments, and then secured another loan from Respondent Great Western Bank (Great Western) in August 1986. The Beaches used those loan proceeds to pay off and satisfy the initial loan. *Id.* at 989. Great Western provided the Beaches with Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667 (1994), disclosure documents and, at the closing, notified them of their absolute right to rescind the agreement within three business days following the transaction.[2]

Five years later on December 1, 1991, the Beaches defaulted on their mortgage after failing to make their installment payments. 670 So.2d at 989. Subsequently, Great Western instituted a foreclosure action in June 1992. In response, the Beaches raised several affirmative defenses, including their right to rescind and TILA damage claims. The basis of the Beaches' rescission claim was several overstatements made by Great Western on the disclosure documents. The trial court found that Great Western overstated the Beaches' monthly mortgage payment by fifty-eight cents ($.58), resulting in a $201.84 overcharge. The court also found that Great Western overstated the finance charge by $7.24 ($176,519.21 rather than $176,511.97). The trial court ruled for Great Western on the rescission issue, finding that the loan was an

[2] TILA also allows rescission up to three years after the transaction if the creditor fails to make all material disclosures to the borrower. This three-year extension, section 1635(f), based upon the lender's bad faith in not disclosing material terms, is the key provision at issue in this case. Material disclosures include the loan's annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule.

exempt transaction not subject to rescission,[3] and that the Beaches' failure to assert their rescission right within three years of closing precluded their claim. 670 So.2d at 989. However, the trial court awarded the Beaches $396 in actual damages and $1000 in statutory damages as provided by TILA[4] to remedy the overstatements, set them off against the balance due Great Western, and found Great Western's lien superior to all other encumbrances. 670 So.2d at 989.

On appeal to the Fourth District, the Beaches contended that they could assert their rescission right as a defense in recoupment for TILA violations even beyond the three-year period fixed by the statute. *Id.* at 990. The district court disagreed, concluding that recoupment is primarily an equitable remedy designed to prevent unjust enrichment. *Id.* Recognizing that the statute already provides borrowers a right to assert damages as a defense in recoupment, the court deemed the further remedy of rescission as a penalty provision to creditors and further noted that the rescission right was purely a creation of the statute itself and the statute specifically fixed a time limitation on the right. *Id.* at 990-93. Consequently, the district court affirmed the trial court's final judgment,

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[3] "Residential mortgage transactions" are exempt from TILA's rescission requirements. Section 1602(w) defines these loans as "created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling."

[4] Section 1640 provides for actual and statutory damages and includes a one-year statute of limitations in subsection (e). However, section 1640(e) also contains a savings clause which specifically allows "defense by recoupment or set-off" beyond the one-year statute of limitation.

holding that under Florida law the statutory right of rescission in TILA expires three years after the transaction's closing date and may not be revived as a defense in recoupment in a creditor's foreclosure action. *Id.* at 993. Finally, recognizing the potential significance of its decision to thousands of other Florida borrowers, the district court certified the above question for our review. *Id.* at 994.

LAW AND ANALYSIS

As the district court acknowledges, there is a "split of authority in the country on this issue," *Beach*, 670 So.2d at 990 n. 2, of whether the right of rescission may be asserted as a defense in recoupment for TILA violations beyond the statute's three-year expiration period. We begin our analysis with an overview of TILA and the relevant caselaw.

In 1968, Congress enacted TILA with the broad purpose of ensuring "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *See* 15 U.S.C. § 1601(a) (1994). As part of the Act, Congress provided the consumer with the absolute right to rescind the secured transaction within three business days following closing for any reason, and up to three years from the same closing date if the creditor failed to make all material disclosures. Section 1635(f) of 15 U.S.C. (1994), expressly provides: "An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon sale of the property, whichever occurs first. . . . " When a

borrower exercises his or her right to rescind in either of the above circumstances, he or she is not liable for any finance or other charges, and any security interest given by the borrower becomes void upon rescission.[5] The end result is that the lender can only collect on the loan principal and loses any security for the loan's collection. *Beach*, 670 So.2d at 989.

TILA also provides for actual and statutory damages in section 1640(a). Furthermore, while section 1640(e) includes a one-year statute of limitations, it also specifically "does not bar a person from asserting a violation . . . in an action to collect the debt . . . as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law." This savings clause is only found in this section relating to damages; no corresponding clause accompanies the expiration of the statutory right of rescission in section 1635.

Congress also recognized that the complexity and variety of credit transactions precluded comprehensive regulation by a single statute. Accordingly, it delegated extensive authority to the Federal Reserve Board to implement regulations governing commerce in credit. 15 U.S.C. § 1604(a). In this case, the result was Part 226 of Title 12 of the Code of Federal Regulations, better known

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[5] This is in contrast to common law rescission whereby the rescinding party must first tender the property received under the agreement before the contract is considered void. *See* Joel P. Bishop, *Commentaries on the Law of Contracts* § 833 (Enlarged ed. 1887); *see also Kamerman v. Curtis*, 285 N.Y. 221, 33 N.E.2d 530 (1941); *E.T.C. Corp. v. Title Guarantee & Trust Co.*, 271 N.Y. 124, 2 N.E.2d 284 (1936).

as Regulation Z. *Selected Commercial Statutes* 1543 (West Publishing Co., 1995 ed.).

The United States Supreme Court has stated that "deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980). Administrative expertise in this highly technical area should be recognized "[u]nless demonstrably irrational." *Milhollin*, 444 U.S. at 565, 100 S.Ct. at 797. While an agency's interpretation of its own regulations has traditionally been accorded considerable respect, *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945), deference is all the more appropriate in this case as "Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law." *Milhollin*, 444 U.S. at 566, 100 S.Ct. at 797. Thus, any analysis of a TILA issue should include Regulation Z and the Official Commentary thereto, *see Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219, 101 S.Ct. 2266, 2273-74, 68 L.Ed.2d 783 (1981), in addition to the statute's plain language.

Regulation Z treats the right of rescission as follows:

> The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in

> the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

12 C.F.R. § 226.23(a)(3) (1996) (footnote omitted).

Similarly, the Official Staff Commentary concisely states that "the right to rescind automatically lapses on the occurrence of the earliest of the following three events: [t]he expiration of 3 years after consummation of the transaction. . . . " 12 C.F.R. § 226.23, para. 23(a)(3)3. (Supp. I 1996). Likewise, as previously noted, the statute itself provides:

> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon sale of the property, whichever occurs first
>
> . . . .

15 U.S.C. § 1635(f) (1994). In conjunction, these three authorities reflect Congress's intent regarding rights of rescission under TILA. Their clarity and plain meaning support the majority opinion below.[6] However, that does not end our inquiry.

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[6] Of note, Congress enacted TILA amendments in 1995. Although the new provision does not relate to this case's factual situation, the committee report ("Committee Report Regarding Truth-in-Lending Act Amendments of 1995, Section 113, Rescission Rights in Foreclosure") reiterates the plain meaning of the statute. Specifically, "[t]he consumer protection provisions in this section are intended to benefit consumers that are unable to meet their mortgage obligations and are not intended as a mechanism whereby consumers can avoid their obligations by defaulting and then raising the defense in foreclosure." Furthermore, "[r]escission rights expire in three years. The time period shall not be extended except as explicitly provided in section 125(f) relating to agency enforcement proceedings." That exception does not apply to this case.

In Florida, "[i]t is well established that the defense of recoupment may be asserted defensively where the underlying claim is barred by the statute of limitations." *Willoughby v. Dowda & Fields, Chartered*, 643 So.2d 1098, 1099 (Fla. 5th DCA 1994) (on rehearing); *see also Allie v. Ionata*, 503 So.2d 1237 (Fla.1987); *Payne v. Nicholson*, 100 Fla. 1459, 131 So. 324 (1930). Similarly, this principle informed the court in *Dawe v. Merchants Mortgage & Trust Corp.*, 683 P.2d 796 (Colo.1984),[7] a case the Beaches and the dissent below rely upon.

In *Dawe*, the Colorado Supreme Court held that the borrower's demand for rescission was a defense in the nature of recoupment and was not barred by section 1635(f)'s three-year expiration period. However, as noted by the district court, the *Dawe* court simply assumed that section 1635(f) was a statute of limitations which precluded a remedy, rather than a statute which created the right and the remedy, and included its own expiration period. *Beach*, 670 So.2d at 992.

Moreover, the borrowers in *Dawe* defaulted less than a year after consummating their loan, well within TILA's three-year rescission window. However, the creditor did

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[7] Relying on *Dawe*, similar reasoning was used in *Federal Deposit Insurance Corp. v. Ablin*, 177 Ill.App.3d 390, 126 Ill.Dec. 694, 532 N.E.2d 379 (1988); *Community National Bank & Trust Co. v. McClammy*, 138 A.D.2d 339, 525 N.Y.S.2d 629 (N.Y.App.Div.1988); *In re Shaw*, 178 B.R. 380 (Bankr.D.N.J.1994); and *In re Botelho*, 195 B.R. 558 (Bankr.D.Mass.1996).

not seek a judgment for the unpaid principal until more than four years later, outside the three-year window. The creditor's apparent bad faith clearly influenced the *Dawe* court as it concluded that if "recoupment claims were barred by the relevant statute of limitations, lenders could avoid the penalties of the Act by waiting, as here, three years or more to sue on the borrower's default, and thereby frustrate the fundamental policy of TILA." 683 P.2d at 801. In short, the *Dawe* court used a statute of limitations analysis and a strong inference of creditor bad faith with which to justify its rescission of the loan agreement beyond the three-year expiration period.

The *Dawe* court also relied on *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695, 79 L.Ed. 1421 (1935) to reach its equitable result. In *Bull*, the Court ordered recoupment as an offset of estate taxes mistakenly paid on a transaction, which had been raised as a defense to an IRS suit for the payment of back income taxes on the same transaction. 295 U.S. at 261, 55 S.Ct. at 700. The Court recognized that "[w]hile here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights." *Id.* Thus, as the district court stated, "[r]ecoupment was therefore equitable in nature to prevent an unjust result." *Beach*, 670 So.2d at 990. In contrast, the inequities which undoubtedly influenced the decisions in *Dawe* and *Bull* are not present in the case before us.

The Beaches and the dissent below also place great reliance on our decisions in *Allie v. Ionata*, 503 So.2d 1237 (Fla.1987), *Rybovich Boat Works v. Atkins*, 585 So.2d 270 (Fla.1991), and *Beekner v. L.P. Kaufman, Inc.*, 145 Fla. 152, 198 So. 794 (1940). However, all of these cases addressed

statutes of limitation and are thus distinguishable. None of the cases addressed a TILA-type statute where the act created the right and provided a remedy.

In *Allie*, petitioner Allie (Ionata's accountant and financial advisor) sold respondent Ionata several parcels of land whose prices Ionata eventually found (several years later) to be severely overinflated. Ionata stopped making payments and sued for restitution and rescission, alleging fraud and breach of fiduciary duty. In response, petitioner Allie pled the four-year statute of limitations as an affirmative defense and counterclaimed for the unpaid balance on two of the notes. At trial, the jury found Allie not guilty of actual fraud, but did find he *breached his fiduciary duty*. On appeal, the Fifth District found respondent Ionata's action on two of the notes barred by the statute of limitations. Upon review, we held that a counterclaim of recoupment of money damages may be asserted even though the underlying claim itself would have been timebarred if raised as a separate cause of action. *Allie*, 503 So.2d at 1239-40.

In *Rybovich*, respondent Atkins entered into a land purchase contract in June 1985 with petitioner Rybovich. Atkins never gave Rybovich the required seven-days' advance notice of the closing date. The closing, which could occur no later than December 1987, never took place. In February 1988, the parties exchanged letters each declaring the other in default. Later that month, Rybovich entered into another contract to sell the property to a third party. Upon hearing of the pending sale, Atkins' attorney informed the title company insuring the sale that Atkins had an interest in said property. Consequently, the title company would not insure the property

against Atkins' claim and the entire transaction failed. Rybovich sued Atkins for breach of contract, tortious interference with the second transaction, and slander of title. Atkins counterclaimed for, among other things, specific performance of the original land sale contract. Rybovich responded that the specific performance claim was barred by the one-year statute of limitations and the trial court agreed.

On certiorari review, the Fourth District relied on *Allie* and quashed the trial court's order. We, in turn, quashed the district court's decision and reinstated the trial court's order, refusing to permit Atkins' assertion of the time-barred claim for specific performance as a defense to Rybovich's damages action. We explained that allowing such a claim "would have the effect of placing a cloud on the title of any real property that was the subject of a failed contract for purchase and sale." *Rybovich*, 585 So.2d at 271. We noted the harshness of specific performance and recognized that "[a]dequate remedies remain available to buyers. . . . " *Id.* at 272. Those remedies included common law rescission of contracts, not statutory rescission as in this case.

In *Beekner*, petitioner Beekner raised the defense of usury (25% interest rate) in a collection action by respondent Cappel to foreclose a mortgage securing notes for a loan. We considered the question of whether the usury defense provided in section 6942, Compiled General Laws (1927), could be precluded by the two-year statute of limitations included in section 4663, Compiled General Laws (1927). We allowed the usury defense, noting that "a contrary holding would enable the lender to purge a usury-infected contract by the simple process of awaiting

the running of the statute of limitations before bringing his suit." *Beekner*, 145 Fla. at 156, 198 So. at 796.

After closely reviewing *Allie*, *Rybovich*, and *Beekner*, we conclude that none of those cases addressed the specific situation found here where a statute simultaneously created a right and its remedy. Furthermore, and just as significantly, the losing party in each of those cases demonstrated bad faith conduct, a factor not present in the case before us. Thus, we find that *Allie*, *Rybovich*, and *Beekner* are not controlling.

Turning to this case, the district court concluded that "[t]o allow the consumer to assert the expired right of rescission in recoupment as a matter of public policy where Congress has not chosen to extend it does not sufficiently provide us with a public policy reason for extending recoupment." *Beach*, 670 So.2d at 993. Moreover, the district court's rationale further distinguishes this case from *Allie* as that case was decided "primarily on considerations of public policy and fairness as well as an analysis of the purpose of statutes of limitation." *Rybovich*, 585 So.2d at 271. We also noted that

> [f]undamental fairness required this result in *Allie*. A contrary holding would have authorized plaintiffs to take advantage of technical quirks in the law to file their lawsuits after defendants' counterclaims have become timebarred. Under such a scheme, even the grossest misconduct by the plaintiff could be excluded from the court's consideration. Statutes of limitation are intended to promote fairness, not to encourage this type of misconduct.

Id. Unlike *Dawe* and *Allie*, no such manipulation of technical defenses occurred in this case. On the contrary, we agree with the district court that the real danger is that borrowers "could take advantage of the remedy throughout the entire life of the secured transaction, rendering the statutory limitation meaningless." *Beach*, 670 So.2d at 991. The Beaches' three-year limit on the right of rescission expired in 1989. They subsequently defaulted in December 1991 and Great Western filed its foreclosure action in June 1992. Great Western exercised its foreclosure rights only after the Beaches failed to meet their obligation. Thus, by making their monthly mortgage payments, the Beaches' had full control over Great Western's "ability to foreclose on its security interest in the residence." *Id.* Furthermore, the Beaches' remedy to the overstatement – damages – was extraneous to the foreclosure action. The savings clause in section 1640 preserved that option beyond the one-year statute of limitations as a "defense by recoupment or setoff."

In contrast, Congress did not include such a savings clause in section 1635 regarding the right of rescission. Indeed, section 1635(f) explicitly provides that *both the right and the remedy expire* three years after the closing date. Thus, as the district court notes, TILA mirrors a statute of repose, not a statute of limitations, 670 So.2d at 992 n. 3, in that it "precludes a right of action after a specified time . . . rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued." *Kush v. Lloyd*, 616 So.2d 415, 420 (Fla.1992).

As a general rule, "[w]here Congress includes particular language in one section of a statute but omits it in

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983). Therefore, despite the Beaches' assertion that section 1635(f) should not be given its plain meaning, we read that section as unambiguously expressing Congress's intent to extinguish the statutory right of rescission three years after the transaction's closing.

Similarly, this Court traditionally has avoided "readings that would render part of a statute meaningless." *Unruh v. State*, 669 So.2d 242, 245 (Fla.1996); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 456 (Fla.1992); *Villery v. Florida Parole & Probation Comm'n*, 396 So.2d 1107 (Fla.1980); *Cilento v. State*, 377 So.2d 663 (Fla.1979). Underlying that caution is our assumption that legislatures do not "enact purposeless and therefore useless, legislation." *Sharer v. Hotel Corp. of America*, 144 So.2d 813, 817 (Fla.1962). Furthermore, "[w]hen the legislature has used a term . . . in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So.2d 911, 914 (Fla.1995); *see also Florida State Racing Comm'n v. Bourquardez*, 42 So.2d 87, 88 (Fla.1949) ("The legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction. . . . ").

More precisely, we have long recognized that "when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of

the right." *Bowery v. Babbit*, 99 Fla. 1151, 1163-64, 128 So. 801, 806 (1930). In *Bowery*, we emphasized that the "statute limiting the time to bring suit . . . is not regarded as a technical statute of limitations." 99 Fla. at 1164, 128 So. at 807. Therefore, *Bowery* controls our interpretation of TILA under Florida law. As we have detailed, *Allie*, *Rybovich*, and *Beekner* all addressed distinct and separate questions of law and thus we are unpersuaded by the Beaches' and the lower court dissent's extensive citation of those cases.

Consistent with *Bowery*, the Fifth Circuit's opinion in *Simon v. United States*, 244 F.2d 703 (5th Cir.1957) reflected federal statutory construction principles when it reasoned:

> A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right.

Id. at 704-05 (quoting 34 Am.Jur. *Limitation of Actions* § 7 (1941)); *see also Maahs v. United States*, 840 F.2d 863, 866 n. 4 (11th Cir.1988) (explaining difference between statutes of limitation and expiration period in Federal Tort Claims Act, which created previously non-existent right to sue government in tort, noting under FTCA "very [sic] right to sue evaporates after the expiration of the stated time"). Thus, as stated in the district court's opinion, "Florida law and federal law appear consistent as to the proper

analysis of this statute." *Beach*, 670 So.2d at 992. We agree with the district court's analysis. Therefore, we hold that under Florida law, an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f).

CONCLUSION

The facts of this case do not compel us to disregard a statute's plain meaning. If "[r]ecoupment is the keeping back of something that is due because there is an equitable reason for holding it[,]" *Williams v. Neely*, 134 F. 1, 5 (8th Cir.1904), the Beaches' claims have little merit. As the district court stated, "[t]he further remedy of rescission under TILA is a penalty provision to the creditor, not a remedy required by equity and good conscience beyond the statutory period of three years." *Beach*, 670 So.2d at 990.

Accordingly, we approve the decision below and answer the certified question in the negative. We decline to address the other issues raised by the Beaches which were neither in the district court's opinion nor within the scope of the certified question.

It is so ordered.

OVERTON, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.

SHAW, J., recused.

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

District Court of Appeal, Fourth District

WHEREAS, in that certain cause filed in this Court styled:

DAVID R. BEACH, et ux, V.
GREAT WESTERN BANK, etc.

Case No.: **87,835**

Your Case No.: **94-1049**

The attached opinion was rendered on: **February 13, 1997**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Gerald Kogan, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 2nd day of July, 1997.

[SEAL]

/s/ Illegible
Clerk of the Supreme Court of Florida

Supreme Court of Florida

FRIDAY, APRIL 25, 1997

DAVID R. BEACH, et ux., Petitioners, v. GREAT WESTERN BANK, etc., Respondent.	CASE NO. 87,835 District Court of Appeal, 4th District – No. 94-1049

Petitioners' Motion for Rehearing filed in the above cause is hereby denied.

Petitioners' Motion for Attorney Fees and Costs is hereby denied.

Respondent's Motion for Attorney Fees and Costs is granted; the amount to be determined by the trial court. See Fla.R.App.P. 9.400(b), 351 So.2d 981.

KOGAN, C.J., OVERTON, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur

SHAW, J., recused

[SEAL]

A true Copy TC

TEST:

cc: Hon. Marilyn Beuttenmuller, Clerk

By: Illegible
Deputy Clerk

Sid J. White
Clerk, Supreme Court

Hon. Dorothy H. Wilken, Clerk
Hon. Thomas E. Sholts, Judge

Mr. James A. Bonfiglio
Mr. Steven Ellison

MANDATE

from

DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

FOURTH DISTRICT

This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Bobby W. Gunther, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE:	May 12, 1997
CASE NO.: .	94-1049
COUNTY OF ORIGIN:	Palm Beach
T.C. CASE NO.:	CL 92-6071 AG
STYLE:	Beach v. Great Western Bank

A TRUE COPY

/s/ Marilyn Beuttenmuller,
Marilyn Beuttenmuller, Clerk
District Court of Appeal
Fourth District

ORIGINAL TO: Hon. Dorothy H. Wilken, Clerk

cc: James A. Bonfiglio
Steven Ellison

/CR

Supreme Court of Florida

WEDNESDAY, MAY 28, 1997

DAVID R. BEACH, et ux., Petitioners, v. GREAT WESTERN BANK, etc., Respondent.	CASE NO. 87,835 District Court of Appeal, 4th District – No. 94-1049

The Mandate Issued by this Court on April 25, 1997, is hereby vacated.

Petitioners' Motion to Stay Mandate is hereby granted and proceedings in this Court, in the District Court of Appeal, Fourth District, and in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida are hereby stayed for a period of thirty (30) days to allow Petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that court.

[SEAL]

A True Copy
TEST:
/s/ Illegible
Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Marilyn Beuttenmuller, Clerk
Hon. Dorothy H. Wilken, Clerk
Hon. Thomas E. Sholts, Judge
Mr. James A. Bonfiglio
Mr. Steven Ellison